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A. A. Robert

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 280 ➤

MISSOURI PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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FILED FEBRUARY 18, 1925

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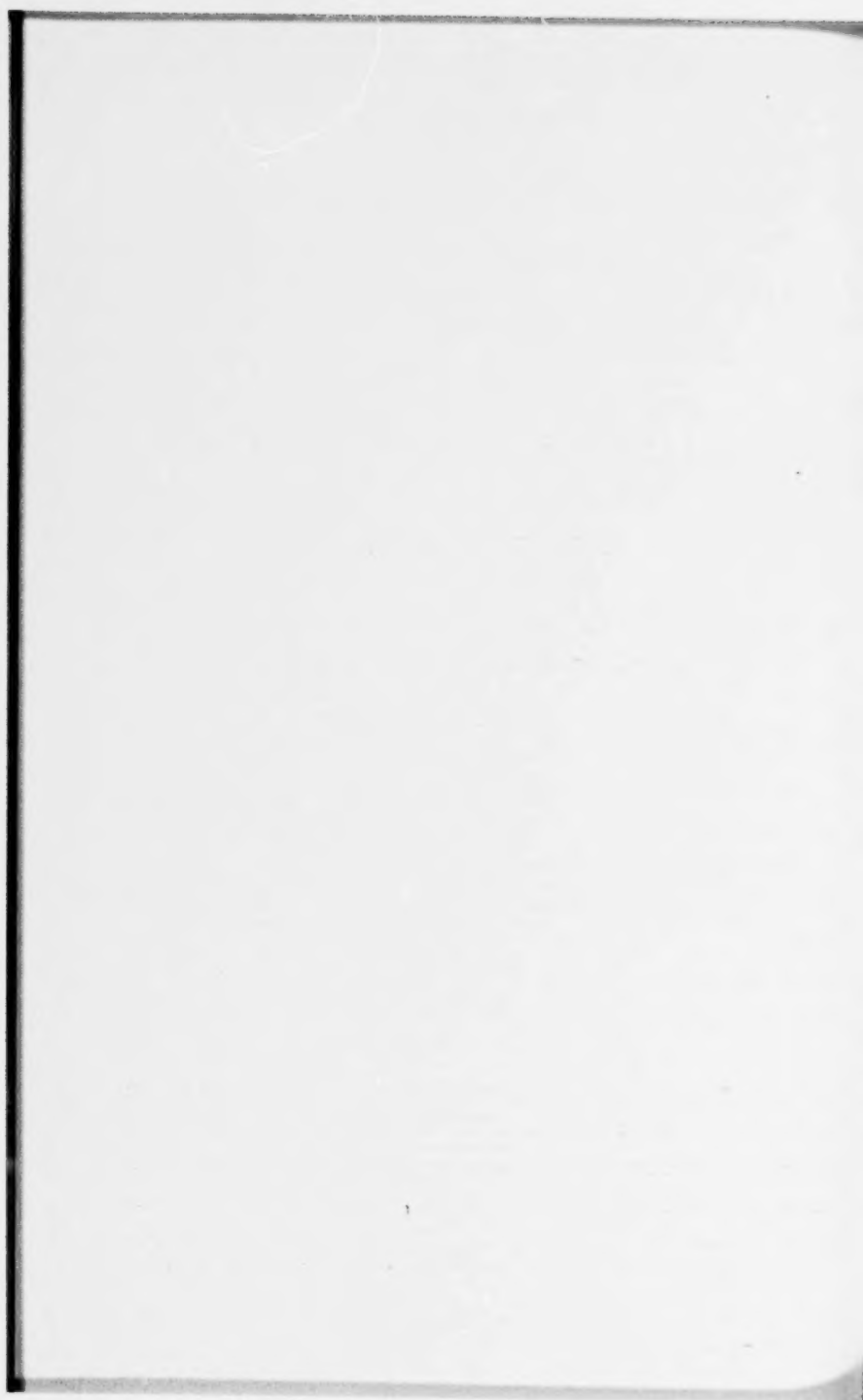
v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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[fol. 1] **COURT OF CLAIMS OF THE UNITED STATES****MISSOURI PACIFIC RAILROAD COMPANY****vs.****THE UNITED STATES****I. HISTORY OF PROCEEDINGS**

On May 31, 1923, the plaintiff filed its original petition.

On July 30, 1923, the defendant filed a demurrer to plaintiff's petition.

On January 9, 1924, the demurrer was argued and submitted by Messrs. George H. Foster and Joseph Stewart, for the defendant, and by Messrs. Fred H. Wood and Thomas Watt Gregory, for the plaintiff.

On March 31, 1924, the court filed an order sustaining the demurrer and dismissing the petition, with an opinion by Campbell, Ch. J.

(NOTE.—This opinion will be found on p. 30 of this record.)

On June 24, 1924, by leave of court, the plaintiff filed its amended petition. Said amended petition is as follows:

[fol. 2] **II. AMENDED PETITION—Filed June 24, 1924**

To the Honorable the United States Court of Claims:

Your petitioner, Missouri Pacific Railroad Company, by leave of court hereinbefore obtained, files this its amended petition and respectfully represents as follows:

I

Your petitioner is a corporation organized and existing under the laws of the State of Missouri and is engaged as a common carrier in the business of operating a system of railroads, together with branch lines and extensions in the State of Missouri, Arkansas, Colorado, Illinois, Kansas, Louisiana and Oklahoma. On June 1, 1917, your petitioner became the owner of the systems of railroad in said states theretofore owned by The Missouri Pacific Railway Company and St. Louis, Iron Mountain and Southern Railway Company, and [fol. 3] which for many years prior to said date were operated by the said last mentioned companies, or the duly appointed and qualified Receivers thereof, and has operated the same continuously since June 1, 1917, except during the period from January 1, 1918, to February 29, 1920, when the railway system of your petitioner was in the possession of and operated by the United States Government. Among the lines of railroad so acquired, owned and operated are

the lines in aid of whose construction the land grants described in paragraph 2 hereof were made.

II

The predecessors in interest of your petitioner were aided in the construction of that portion of the lines of railroad owned and operated by your petitioner which is located between St. Louis, Mo., and Pacific, Missouri, by certain grants of land made by the United States by an act of Congress of June 10, 1852, and in the construction of those portions of the said lines which are located between Birds Point, Mo., and Poplar Bluff, Missouri, between Poplar Bluff, Missouri, and Texarkana, Arkansas, and between Little Rock, Arkansas, and Ft. Smith, Arkansas, by certain grants of lands made by the United States by an act of Congress of February 9, 1853. Section 6 of the said act of 1852 provides as follows:

"That the United States Mail shall at all times be transported on said railroads under the direction of the Post Office Department, at such price as Congress may by law direct."

Section 6 of the said act of February 5, 1853, provides as follows:

"That the United States Mail shall at all times be transported on the said road and branches under the direction of the Post Office Department at such price as Congress may by law direct."

[fol. 4] Your petitioner is the lawful successor of the railroads in aid of whose construction said grants were made and as such is entitled to the benefits of said land grants, and is and was at all times in this petition mentioned subject to the duties and obligations thereby imposed including the express agreements made in the aforesaid sections of said act. Those portions of the owned and operated lines of your petitioner in aid of whose construction said land grants were made and which are specifically described above were between June 1, 1917 and December 31, 1917, both inclusive, located wholly within the limits of mail routes known to and designated by the Post Office Department of the United States as routes numbered 145519, 147526, 150571, part 1, 145505, 147517, 147525, 145537, part 1, and 147508, and between March 1, 1920, and December 31, 1923, and to the date of the filing of this petition were located wholly within the limits of mail routes so known and designated as routes numbered 107726 and 111795. Your petitioner and its predecessors in interest have in the operation of said lines of railway fully complied with the obligations imposed upon them by the said acts of Congress. The said acts of Congress will be hereinafter referred to for convenience as the "Land Grant Acts," the lines in aid of whose construction said grants of land were made, as described above, as "Land Grant Mileage," and the mail routes within which said Land Grant Mileage is located as "Land Grant Routes."

III

The administration of the postal service requires, first, suitable provision for the receipt of mail matter from the public; second, its assemblage, sorting and distribution into pouches, sacks, or other appropriate containers for transportation and in preparation therefor, technically known as "distribution," and hereinafter so [fol. 5] described; third, its transportation; and, fourth, its final delivery to addressee. The multitude of letters, postal cards, circulars, newspapers, magazines and parcels collected by letter carriers or deposited in post offices by the public and commonly known as mail matter are not each and severally ready for transportation when offered to the Post Office Department by the public. Moreover, the Post Office Department has devised, owns and employs bags of different sizes, classes and material, into which the mail matter is "distributed" and placed for transportation, and it is so offered to the railroads by the Post Office Department. Letters, postal cards and similar mail matter are "distributed" and placed in pouches which are locked, the keys of which are exclusively in possession of employees of the Post Office Department, and these pouches cannot be opened by railroad employees in the process of transportation. The papers and parcels delivered to railroad companies for transportation are "distributed" and placed in sacks prior thereto and railroad employees are forbidden to disturb or touch the contents of said sacks during their transportation. In the economical and expeditious dispatch of mails a large volume of mail matter is redistributed one or more times between point of receipt and final delivery, which said redistribution is accomplished by the opening of pouches, sacks, bundles or other containers of mail, and the redistribution of the matter thus assembled into appropriate containers for further transportation and delivery according to destination. For many years after railroads were made post roads and became mail carriers, all said distribution and redistribution was made in post offices. Thereafter the Post Office Department inaugurated a system whereby a portion of said distribution or redistribution should be made by employes of the Post Office Department in railway cars fitted up with letter cases, tables, racks and other fixtures similar to the facilities provided and used [fol. 6] for like purposes in ordinary post offices, commonly known as railway post offices, the nature and use of which will be hereinafter more specifically described, but such distribution was unknown and no such cars were in use or existence on any railroad in the United States at the time of the making of petitioner's land grant. The furnishing of railway post office cars for distribution greatly increased the space required and the expense incurred by railroad companies furnishing the same beyond that required and incurred in the mere transportation of the mails.

At the time of the inauguration of train distribution and at all times since the distribution performed in said cars has been recognized and undertaken by the Post Office Department as a function of the Post Office Department and as not embraced under any statutory or contractual obligation of your petitioner or of any other

railroad company to transport the mails, and the said distributing service has been at all times and is performed solely by the agents and employees of the Post Office Department riding in such cars, from which, under the rules of the Post Office Department, railway employees are excluded except to the extent that train crews are required to pass through said cars in the discharge of their duties. Between the inauguration of said train distribution and the passage of an act of Congress of July 28, 1916, hereinafter more specifically referred to, railway post office cars for the performance of said distribution were furnished by the petitioner and other railroads to the Post Office Department under contract and not otherwise.

After the said inauguration of train distribution mails were distributed in part in ordinary post offices and in part in railway post office cars. Subsequently the Post Office Department, as a measure of economy through the reduction of train distribution, established [fol. 7] at numerous railway centers in the United States what are known as terminal post offices as a substitute for railway post offices, which said terminal post offices are post offices located in or near railway stations wherein mails are redistributed in the manner aforesaid for the purposes of further transportation. There were during the period covered by the services hereinafter described approximately forty-seven such terminal railway post offices wherein the service performed is in all respects similar to that performed in railway post offices. From and after the establishment of such terminal post offices and throughout the period covered by the services hereinafter described, distribution was performed in part in ordinary post offices, in part in railway post offices, and in part in terminal post offices. A large part of the distribution of mails made in said terminal post offices was formerly made in railway post office cars, and the transfer of such distribution from railway post office cars to terminal post offices is an illustration of the fact that distribution is made where demonstrated to be most convenient or economical to the Post Office Department in the performance of its administrative functions, and not as a part of the transportation of the mails.

The said service of distribution wherever performed was and is performed exclusively by postal agents and employes, is similar in character and performance whether performed in ordinary post offices, terminal post offices or railway post offices, and wherever performed has ever since the inauguration of the postal service been recognized by the United States and its Post Office Department as a service separate and distinct from the transportation of the mails themselves. The extent to which distribution is performed in ordinary post offices, terminal post offices and railway post offices, respectively, is and at all times has been wholly at the election of [fol. 8] the Post Office Department and is and at all times has been governed wholly by the distributing policy and requirements of the Post Office Department and only incidentally by the volume of the mail to be transported.

By an Act of March 3, 1873, Congress in addition to providing compensation for the transportation of the mails on a scale of rates

fixed in said Act, provided for the making of additional allowances for furnishing railway post office cars for the sole purpose of compensating the railroads furnishing the same for the additional service performed in furnishing said cars and space therein for distribution, at rates fixed in said Act, and appropriated the necessary funds therefor and authorized their payment. Thereafter Congress from time to time appropriated funds to be used in payment for the transportation of the mails and in the making of additional allowances for the furnishing of railway post office cars at rates from time to time fixed by Congress.

By an Act of Congress of July 12, 1876, it was provided that all railroads which had been aided in their construction by land grants, requiring them to transport the mails at such a price as may be fixed by Congress, should receive but 80 per centum of the compensation accruing to other railroads under the rates of pay authorized by Congress for such other carriers which said foregoing provision of law remained in force until the passage of the Act of July 28, 1916, hereinafter referred to.

From and after the effective date of said Act of July 12, 1876, the Petitioner and all other railroad companies, which had received land grants similarly conditioned, received but eighty per centum of the rates authorized for payment to other railroads at the scale of rates from time to time fixed by Congress for the transportation of the mails, but for all services performed in furnishing railway post office [fol. 9] cars from the effective date of said Act to November 1, 1916, received the same compensation accruing to other railroads for the performance of a like service, notwithstanding the provisions of said Act, the making of which payments were duly authorized by appropriations made from time to time by Congress. Petitioner alleges that throughout said period payment of said additional allowances for railway post office cars to all railroad companies, including your petitioner and other railroads which had received land grants similarly conditioned, was made in recognition of the fact that the furnishing of said cars constituted a service in addition to the transportation of the mails, and that the practice throughout said period of paying for said service the same compensation accruing to other than land grant carriers, when considered in connection with the provisions of said Act of July 12, 1876, constitutes a contemporaneous construction of your petitioner's land grant, whereby the furnishing of said cars was treated as a service separate from and in addition to the transportation of the mails and as not embraced within the obligation of the petitioner to transport said mails at such price as might be fixed by Congress; and your petitioner alleges the fact to be that the furnishing of railway post office cars and distributing facilities therein is a service separate and distinct from and in addition to the transportation of the mails required by said land grant acts. And your petitioner further alleges that for all services performed by it in furnishing railway post office cars and distributing facilities therein from the date of the inauguration of said service down to and including November 1, 1916, it has received the full

compensation from time to time authorized therefor for other carriers, without deduction on account of said provisions of said land grant acts; that at no time during said period did your petitioner concede that the furnishing of said facilities for distribution was [fol. 10] within the obligation imposed upon it by said land grant acts, but, on the contrary, continuously asserted that the furnishing of said facilities constituted a service in addition to the transportation of the mails, and that throughout said period its right to the same compensation therefor accruing to other carriers was acquiesced in by the Post Office Department, and accepted by it as correct.

For terminal post offices located in railway stations both before and after the passage of said act of July 28, 1916, railroads have been paid compensation for the space furnished therein, in addition to compensation paid for the transportation of the mails, without deduction therefrom on account of any land grant obligation of the railroad company furnishing such space or joining in furnishing the same.

IV

Prior to an Act of Congress of July 28, 1916, the transportation of the United States mails by railroads was by means of voluntary contracts entered into between the several railway companies and the Post Office Department on the basis of weights ascertained according to law, with additional payments for full railway post office cars, as hereinbefore referred to, but this system was terminated by the said act, which was designed to and did cancel any provision for voluntary service by contract, and substituted therefor provision for the compulsory performance of all services defined in said act.

The said act of July 28, 1916 made it the duty of all railway companies from and after the passage of said act to provide the services defined therein to the extent and in the manner required by the Postmaster General, and all railway companies refusing or failing so to do were and are subject to the fines and penalties imposed by said act for such failure or refusal. The services so required to be performed [fol. 11] include both the transportation of the mails, and in addition thereto the furnishing of full railway post office cars and of apartment railway post office cars, hereinafter collectively described as "railway post office cars," for the purposes hereinafter described. Railway post office cars are cars constructed in accordance with plans and specifications made or approved by the Post Office Department which, in addition to space provided for the transportation of the mails, contain space occupied by letter cases, tables, racks and other fixtures, hereinafter collectively called "distributing facilities" which are provided in said cars solely for the purpose of the opening of pouches and sacks and distributing their contents and other classes of mail by the agents and employees of the Post Office Department, through the means of the facilities described and according to destination, into appropriate containers for transportation and delivery and are used for said purposes, the said service thus performed being hereinafter described as "distribution," and the space in said cars occupied by distributing facilities together with that furnished and necessary for the use of said agents and employees of the Post Office

Department in making said distribution, being hereinafter referred to as "distribution space." Among other things, the said act provides:

"All cars or parts of cars used for the railway mail service shall be of such construction, style, length, and character, and furnished in such manner as shall be required by the Postmaster General, and shall be constructed, fitted up, maintained, heated, lighted, and cleaned by and at the expense of the railroad companies. No pay shall be allowed for service by any railway post-office car which is not sound in material and construction and which is not equipped with sanitary [fol. 12] drinking-water containers and toilet facilities, nor unless such car is regularly and thoroughly cleaned. No pay shall be allowed for service by any wooden full railway post-office car unless constructed substantially in accordance with the most approved plans and specifications of the Post Office Department for such type of cars, nor for service by any wooden full railway post-office car run in any train between adjoining steel cars, or between the engine and a steel car adjoining. After the first of July, nineteen hundred and seventeen, the Postmaster General shall not approve or allow to be used, or pay for service by, any full railway post office car not constructed of steel or steel underframe or equally indestructible material; and all full railway post-office cars accepted for this service and contracted for by the railroad companies hereafter shall be constructed of steel. Until July first nineteen hundred and seventeen, in cases of emergency and in cases where the necessities of the service require it, the Postmaster General may provide for service by full railway post office cars of other than steel or steel underframe construction, and fix therefor such rate of compensation within the maximum herein provided as shall give consideration to the inferior character of construction, and the railroad companies shall furnish service by such cars at such rates so fixed."

The said act further provides:

"Railroad companies carrying the mails shall furnish all necessary facilities for caring for and handling them while in their custody. They shall furnish all cars or parts of cars used in the transportation and distribution of the mails, except as herein otherwise provided, and place them in stations before the departure of trains at such times and when required to do so."

[fol. 13] The purpose of requiring said cars to be placed in stations before the departure of trains is, among other things, to enable the Post Office Department to perform therein its administrative function of distribution in advance of the transportation of the mails thus distributed, and in accordance with said requirement petitioner has from time to time during the period hereinafter named placed railway post office cars in its stations in advance of the departure of its trains and frequently many hours in advance thereof whenever so required by the Post Office Department, and many hours in advance of the time when it would have been necessary to place

said cars in stations for the loading and transportation of the mails.

The said act further provides:

"If any railroad company carrying the mails shall fail or refuse to provide cars or apartments in cars for distribution purposes when required by the Postmaster General, or shall fail or refuse to construct, fit up, maintain, heat, light, and clean such cars and provide such appliances for use in case of accident as may be required by the Postmaster General, it shall be fined such reasonable sum as may, in the discretion of the Postmaster General, be deemed proper."

Distribution of the mails in said cars requires an intimate knowledge of the location of Post Offices off the line of the railroad transporting the mails therein distributed, of mail routes, and of practices and regulations of the Post Office Department in the performance of its administrative functions, none of which is possessed by railway employees, and said distribution is not and cannot be made by the employees of the railroad furnishing transportation, but is performed by expert agents and employees of the Post Office Department trained for said purpose, of whom there are sometimes as high [fol. 14] as six or seven engaged in distribution in a single car, which said agents and employees of the Post Office Department are carried in said cars by said railway companies without additional compensation, as required by law, and the mails therein distributed and all other mails in said cars contained are at all times within the sole custody of the agents and employees of the Post Office Department. The said distribution made in railway post office cars operated over petitioner's land grant routes was at all times herein mentioned and is now to a large extent of mail which is not taken on or put off the cars on said land grant routes but is made thereon by the said expert agents and employees of the Post Office Department for distant territory beyond said routes and beyond the lines of petitioner's railroad, and a large portion thereof consists of distribution for letter carriers in cities both on and off your petitioner's lines of railroad, in order to enable the Post Office Department to make final delivery of mails so distributed for letter carriers, without further distribution thereof at the Post Office in the city to which the same is addressed.

The said service of distribution is similar in all respects to a like service performed by agents and employees of the Post Office Department in ordinary post offices and the distributing facilities therein contained are generally similar to the distributing facilities provided and used for like purposes in ordinary post offices and in terminal post offices. The extent to which distribution is performed in railway post office cars and the extent to which it is performed in ordinary post offices or in terminal post offices is wholly at the election of the Post Office Department, and the extent to which your petitioner and other railway companies are required or authorized to furnish railway post office cars and the extent of the distribution space therein which they are required or authorized [fol. 15] to furnish, is determined by the Postmaster General wholly

by the volume of mail to be distributed therein and not by the volume to be transported, and is governed wholly by the distributing policy and requirements of the Post Office Department. The "distribution space" in said cars is physically separated from the remaining space therein and is susceptible of actual measurement. In the hereinafter described proceedings before the Interstate Commerce Commission the Post Office Department certified and the said Commission found that, in standard railway post office cars, constructed according to plans and specifications made by the Postmaster General, the total linear feet of space therein is made up as shown by the following table, taken from the report of the said Commission therein:

Unit	Distribution space		Doorways		Storage space		Letter separations	Paper separations	Portable letter separations	Storage space and closet facilities	
	Ft.	In.	Ft.	In.	Ft.	In.				Ft.	In.
60-foot full railway Post Office car	36	..	7	8	16	4	612	234	54	..	....
30-foot mail apartment car.....	17	2	2	10	..	..	312	106	..	10	....
15-foot mail apartment car.....	7	.75	2	6	..	..	156	46	..	4	6.25

Your petitioner alleges that the distribution of space in railway post office cars furnished by it over its land grant routes between June 1, 1917, and December 31, 1917, both inclusive, and between March 1, 1920, and December 31, 1923 was substantially as represented by the foregoing table; that during said period petitioner performed 3,438,350 miles of service in full railway post office cars over said land grant routes, 2,082,906 miles of service in 30-foot apartment railway post office cars over said land grant routes, and 1,089,158 miles of service in 15-foot railway apartment cars over said land grant routes; that not less than sixty per cent of the space furnished and hauled in connection with the aforesaid miles of service performed in railway post office cars, not less than fifty-six and two-thirds per cent of the space furnished and hauled in connection with the aforesaid miles of service in 30-foot apartment railway post office cars, and not less than forty-six and two-thirds per cent of the space furnished and hauled in connection with the aforesaid miles of service in 15-foot railway apartment cars over said Land Grant routes consisted of distributing space as hereinbefore defined, and was furnished and hauled solely for purposes of distribution and was used therefor, the performance of all of which service, including the furnishing of said distributing space, was duly authorized by the Postmaster General and furnished by petitioner under compulsion of the requirements of the said Act of July 28, 1916.

Your petitioner further alleges that it takes three full 60-foot railway post office cars to transport the same volume of mail that is transported in one ordinary baggage car wherein carloads of mail

are carried without distribution, and that it takes approximately three times the space in 30-foot and 15-foot railway apartment cars respectively to carry the same volume of mail which is carried in the equivalent space in ordinary baggage cars, where less than full carloads of mail are carried but not distributed.

Neither said distributing facilities nor any part of the distribution space in railway post office cars are required or necessary for the purpose of transporting the United States mail and are not provided as an aid thereto, but solely for the purpose of enabling the Post Office Department to utilize the time in transit for the performance of the administrative function involved in distribution. The total volume of mail transported in ordinary equipment, other than post office cars, greatly exceed the volume of mail transported in said cars, and the increase in space, required to be furnished, maintained and hauled by your petitioner by reason of the said service of distribution in excess of that required for transportation of the mails is not less than the proportion which the distribution space in said cars is of the total space therein.

Your petitioner has at all times subsequent to June 1, 1917, except during the period of Federal control, performed all services required by it to be performed under said act of July 28, 1916, to the full extent required or requested of it by the Postmaster General in accordance with authorizations of service made by him under the powers conferred by said act, including the furnishing, hauling and maintaining of railway post office cars, conforming in construction to the requirements of said act and of the Postmaster General thereunder, and equipped with distributing facilities of the character herein described and used for the purposes herein described. None of the distribution space in said cars, so furnished by your petitioner under the requirements of said act, was required for the purpose of the transportation of the mails or would have been required or authorized except for the performance of distribution therein by the agents and employees of the Post Office Department; and between June 1, 1917, and December 31, 1917, both inclusive, and from March 1, 1920, to December 31, 1923 your petitioner, by reason of the requirements of said act and in accordance with authorizations and requirements duly made by the Postmaster General thereunder, has furnished and has been required to furnish to the United States, over its Land Grant Mileage and elsewhere on its system of railroads, services in addition to the service of transportation, the extent of which additional service is represented and measured by the proportion which the distribution space in railway post office cars furnished by it under such authorizations bears to the total space in the said cars so furnished in accordance with the requirements of the Postmaster General and has furnished and been required to furnish to the United States [fol. 18] transportation for postal agents and employees engaged in said service of distribution in said cars and to incur with respect thereto the obligation of a common carrier of passengers for hire without additional compensation, all in addition to its obligation under said land grant act to transport the mails at such price as Congress might fix.

V

The said act of July 28, 1916, provided that the Interstate Commerce Commission, after hearing, and in proceedings to be instituted in a manner directed by said act, should from time to time fix and determine the fair and reasonable rates and compensation to be paid for all of the services described in said act and should prescribe the method or methods by weight, space, or both, or otherwise, for ascertaining such compensation, and that all railway common carriers should thereafter receive pay for the services required to be performed by them at the rates so fixed and determined by the Interstate Commerce Commission. The said act further provided as follows:

"Pending the decision of the Interstate Commerce Commission, as hereinafter provided for, the existing method and rates of railway mail pay shall remain in effect, except on such routes or systems as the Postmaster General shall select, and to the extent he may find it practicable and necessary to place upon the space system of pay in the manner and at the rates provided in this section, with the consent and approval of the Interstate Commerce Commission, in order to properly present to the Interstate Commerce Commission the matters hereinafter referred thereto: Provided, That if the final decision of the Interstate Commerce Commission shall be adverse to the space [fol. 19] system, and if the rates established by it under whatever method or system is adopted shall be greater or less than the rates under this section, the Postmaster General shall readjust the compensation of the carriers on such selected routes and systems in accordance therewith, from the dates on which the rates named in this section became effective."

Thereafter, with the consent and approval of the Interstate Commerce Commission the Postmaster General placed each and all of the Land Grant Routes of your petitioner upon the space basis of pay for the purposes described in said act subject to readjustment in accordance with the final decision of the Interstate Commerce Commission as provided therein. Thereafter, in proceedings instituted in accordance with the provisions of said act the Interstate Commerce Commission by report and order, made by it in accordance therewith on December 23, 1919, in a proceeding entitled "Railway Mail Pay, Docket No. 9,200", found that the space basis of pay as inaugurated by the Postmaster General on the routes selected by him should continue in force thereon and should be extended to all other routes. For all services required to be performed by said act of July 28, 1916, and which were performed between November 1, 1916 and January 1, 1918, the Commission fixed and determined (subject to certain prescribed minima) as fair and reasonable rates of pay for all railway companies in the United States and over all routes, including Land Grant routes, the following scale of rates graduated according to the space required therefor, to-wit:

	Cents
For each mile of service by a 60-foot R. P. O. car.....	27
[fol. 20] For each mile of service by a 30-foot Apartment car	15
For each mile of service by a 15-foot Apartment car.....	10
For each mile of service by a 60-foot Storage car.....	28
For each mile of service by a 30-foot Storage space.....	15
For each mile of service by a 15-foot Storage space.....	8
For each mile of service by a 7-foot Storage space.....	4½
For each mile of service by a 3-foot Storage space.....	2½
For each mile of service by a 15-foot Closed-Pouch space.....	10
For each mile of service by a 7-foot Closed-Pouch space.....	5
For each mile of service by a 3-foot Closed-Pouch space.....	3

For all of said services required to be performed on and after January 1, 1918 the Commission fixed and determined, as fair and reasonable rates for all railroads and for all routes, rates 25 per centum in excess of the scale of rates last above set out. Subsequent to the rendition of said report and order by the said Commission the rates so fixed by said Commission as fair and reasonable have not been modified or altered by the said Commission and, at all times subsequent to its rendition, have been in full force and effect. The rates thus established by the Interstate Commerce Commission were based upon a statistical ascertainment of the cost of transporting the mails and of performing the additional services hereinbefore described, as determined by the proportion which the space furnished and provided for said services bore to the total space involved in [fol. 21] passenger train operation, and the reasonable compensation thereby fixed for each of the several classes of service required to be performed by said act of July 28, 1916, was measured and determined solely by the occupied and complementary space required to be furnished in connection therewith and graduated according to the amount of space authorized to be furnished in accordance with said act.

VI

The said act of July 28, 1916, among other things provides:

"The Interstate Commerce Commission shall allow to railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress on condition that the mails should be transported over their roads at such price as Congress should by law direct only eighty per centum of the compensation paid other railroads for transporting the mails and all service by the railroads in connection therewith."

In the said proceedings before the Interstate Commerce Commission your petitioner protested the application of the 80 per centum basis to the distribution space furnished thereunder on its land grant routes and asserted that the services required to be performed in the furnishing of said space were in addition to the obligation imposed upon it by said land grant acts and that it was

lawfully entitled for said services to the same compensation accruing therefor to carriers other than land grant carriers and accruing to your petitioner on its routes other than land grant routes. Notwithstanding said protest the said Commission held said 80 per centum basis to be applicable to distributing space furnished by your petitioner on its land grant routes, but in so doing did not establish said [fol. 22] 80 per cent basis as fair and reasonable compensation for the furnishing of distributing facilities on your petitioner's land grant routes, but on the contrary fixed the rates set forth in paragraph V hereof as fair and reasonable rates for all railroad companies over all routes, including land grant routes. Your petitioner has otherwise duly and seasonably protested the application of said eighty per centum basis to "distributing space" and has demanded of the Postmaster General that it be paid the full compensation therefor accruing to railroads other than land grant railroads for the same service.

Your petitioner avers that under the Land Grant Acts the duty of your petitioner is limited to the duty to transport the mails at such rates as may be fixed by Congress; that neither by the said Land Grant Acts, or otherwise, has your petitioner or any of its predecessors in interest, agreed, or is it bound, in addition thereto to furnish facilities for distribution on its trains or cars and to transport the distributing agents of the Post Office Department therein at such rates as may be fixed by Congress; that for all such additional service performed by your petitioner over its Land Grant Mileage, under the requirements of said act of July 28, 1916, it is lawfully entitled to just and reasonable compensation and to the same compensation accruing to it for the performance of a like service on that portion of its lines not embraced within its Land Grant Mileage, and to the same compensation accruing to all other carriers (not bound by the obligations of similar Land Grant Acts) for the performance of a like service at the said scheme and rates of pay fixed and determined by the Interstate Commerce Commission; and that by reason of the premises your petitioner is entitled under said act of July 28, 1916, to be paid pro rata for all distribution space furnished and hauled by it over its Land Grant Mileage under the requirements of said [fol. 23] act between June 1, 1917 and December 31, 1917, and from and after March 1, 1920, at the scheme and rates of pay established by the Interstate Commerce Commission for services performed in furnishing and hauling of railway post office cars for payment of which demand has been made by your petitioner of the Postmaster General by bills duly rendered. From time to time beginning May 13, 1920, and ending March 31, 1921, the Postmaster General purported to readjust the compensation due to your petitioner for all services performed between June 1, 1917 and January 1, 1918 at the rates lawfully due your petitioner for said services by reason of said decision of the Interstate Commerce Commission and has purported to make final settlement for all services rendered after March 1, 1920, up to and including December 31, 1923, but that, notwithstanding the making of demand and protest as aforesaid, all payments made by the Postmaster General and received by your

petitioner for all services so rendered over its Land Grant Mileage between June 1, 1917, and January 1, 1918, and from March 1, 1920, to December 31, 1923, have been made at the rate of 80 per centum of the rates fixed as fair and reasonable by the Interstate Commerce Commission for the services so rendered, without distinction as between space provided for the transportation of the mails and space provided for distribution, by reason whereof the said Postmaster General has wrongfully withheld from your petitioner and has declined and failed to pay to it for the services performed by it within said periods over its Land Grant Mileage the sum of One Hundred Eighty-nine Thousand Eight Hundred and Eighty and Fifty-four one-hundredths Dollars (\$189,880.54), to the full amount of which it is justly entitled under said act of July 28, 1916, together with the equivalent of interest at the rate of six per centum per annum, the amount owing to it on each of its several Land Grant routes, being [fol. 24] shown on Exhibit A, hereto attached and made a part hereof. Your petitioner further alleges that it was required and compelled under the said act of July 28, 1916, and the requirements of the Postmaster General thereunder to perform all said services and did perform the same under said compulsion; that if it had declined or failed to perform the said services it would have been subject to the fines and penalties imposed by said act for such failure or refusal and that it had no option but to perform the same as demanded; that it entered into no contract, express or implied, to perform the same for less than reasonable compensation and that it at no time, directly or impliedly, acquiesced in the performance of said services for less than reasonable compensation; that the reasonable value of the said services performed by it over its land grant routes in furnishing and hauling distributing space in railway post office cars, in carrying therein the agents and servants of the Post Office Department engaged in said service of distribution, and in performing all other services in connection with said distribution between June 1, 1917 and January 1, 1918, was not less than the sum of One hundred thirty-seven thousand eight hundred three and fifteen one hundredths dollars (\$137,803.15), for which it has been paid and has received to date the sum of One hundred ten thousand two hundred forty-two and fifty-two one hundredths dollars (\$110,242.52), and that the reasonable value of said services of like character performed by petitioner on its land grant routes between March 1, 1920 and December 31, 1923, was not less than the sum of Eight hundred eleven thousand five hundred ninety-nine and fifty-five one hundredths dollars (\$811,599.55), of which it has been paid and has received to date the sum of Six hundred forty-nine thousand two hundred seventy-nine and sixty-four one-hundredths dollars (\$649,279.64); by reason whereof the sum paid to it for the performance [fol. 25] of said services are less than the reasonable value therefor by not less than the said sum of One hundred eighty-nine thousand eight hundred and eighty and fifty-four one hundredths dollars (\$189,880.54), to the payment of which it is justly and lawfully entitled, together with the equivalent of interest at six per centum per annum. Your petitioner avers that no action has been had on

the said claim by Congress or by any of the executive departments of the Government other than as above stated; that your petitioner is the sole owner of the claim above set forth; that no assignment or transfer of the same or of any part thereof, or interest therein has been made; that there exists no debt, counterclaim, or set off by which the said claim may or should be reduced and that no part of the same has been paid; that your petitioner is a citizen of the United States and has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government and that it believes the facts as stated in this petition to be true.

Wherefore, your petitioner prays judgment against the United States in the sum of One Hundred Eighty-nine Thousand Eight Hundred and Eighty and Fifty-four one-hundredths Dollars (\$189,880.54), together with the equivalent of interest at six per centum per annum.

Missouri Pacific Railroad Company, by L. W. Baldwin,
President.

Attest: H. L. Utter, Secretary (Corporate Seal of Missouri Pacific Railroad Company.)

[fol. 26] Sworn to by L. W. Baldwin. Jurat omitted in printing.

[fol. 27]

EXHIBIT "A" TO AMENDED PETITION

Claim of Missouri Pacific Railroad Company

Period: June to December, Inclusive, 1917

Mail route number	Distributing space in railway post-office cars, length of car	Amount of claim
145,519	60 Foot	\$3,452.61
147,526	60 "	15,172.10
150,571 (Part 1)	60 "	6,011.81
145,505	30 "	453.26
147,517	30 "	2,403.07
147,525	30 "	19.24
145,537 (Part 1)	15 "	7.89
147,508	15 "	40.65

Total of claim for period shown..... \$27,569.63

Mail route number	Distributing space in railway post office cars, length of cars	March 1 to December 31, inclusive, 1920	Period		
			Calendar year, 1921	Calendar year, 1922	Calendar year, 1923
107,726	60 Foot	\$21,944.17	\$25,848.73	\$22,862.11	\$16,565.08
"	30 "	904.37	961.49	2,497.56	2,538.27
"	15 "	1,326.29	1,581.62	1,584.09	1,953.29
111,795	60 "	7,265.06	4,890.25	4,350.02	4,631.51
"	30 "	6,156.89	9,207.39	9,256.91	9,579.70
"	15 "	815.82	1,672.56	2,105.35	1,720.78
Total of claim for periods shown...		\$38,413.20	\$44,262.04	\$42,656.04	\$36,988.63
Grand total.....					\$189,880.54

[fol. 28] III. DEMURRER TO AMENDED PETITION—Filed July 9, 1924

Now comes the defendant by its Assistant Attorney General and demurs to the amended petition herein filed and for cause thereof shows:

First. The amended petition does not state a cause of action.

Second. The amended petition does not state a cause of action within the jurisdiction of this court.

Robert H. Lovett, Assistant Attorney General. Geo. H. Foster, Special Assistant to the Attorney General.

IV. SUBMISSION OF DEMURRER TO AMENDED PETITION—October 13, 1924

On October 13, 1924, the demurrer to the amended petition was submitted without argument.

[fol. 29] OPINION OF THE COURT BY BOOTH, J.—Entered January 19, 1925

BOOTH, Judge, delivered the opinion of the court:

On March 31, 1924, the court, in a written opinion by the Chief Justice, sustained a demurrer to plaintiff's petition. (59 C. Cls. 524.) Subsequently, on July 2, 1924, the plaintiff filed an amended petition, to which a demurrer was again interposed.

The extended brief of plaintiff in behalf of its amended petition puts forth no claim of new issues of law, and the amended petition is no more than an elaboration of the facts appearing in the original petition. As a matter of fact, no claim is made to the contrary. The court has gone over the case again, in view of the criticisms directed toward its opinion. We are unable to perceive any manifest error in the previous judgment of the court, and in our opinion the case as first presented is in no wise materially changed by the allegation of the amended petition. The issue remains the same, the record is identical in all substantial particulars, and in our judgment it would serve no useful purpose to do more than reaffirm what has already been expressed by the court in its opinion rendered March 31, 1924.

The demurrer will therefore be sustained and the amended petition dismissed. It is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Campbell, Chief Justice, concur.

[fol. 30] VI. OPINION OF CAMPBELL, Ch., J., REFERRED TO IN
OPINION BY BOOTH, J.—Filed March 31, 1924

CAMPBELL, Chief Justice, delivered the opinion of the court:

The case is before the court upon the defendant's demurrer to the petition. The petition alleges that plaintiff is (as to part of its system of lines) a land-aided railroad. It transports the mails and certain of the mail routes to which this case solely relates are on lines aided by land grants from the United States. See Act June 10, 1852, 10 Stat. 8, and Act February 9, 1853, 10 Stat. 155. The last-named act provides "That the United States mail shall at all times be transported on said road and branches under the direction of the Post Office Department at such price as Congress may by law direct."

It is alleged that by the Act of July 28, 1916, 39 Stat. 412, the system theretofore existing of providing for mail transportation and other and additional services by means of contracts between the Post Office Department and the carriers concerned "was terminated and it was made the duty of all railway companies" to provide the service prescribed by the act. Setting forth the dimensions of the different kinds of post-office cars when constructed according to specifications made by the Postmaster General and the assignment of space therein to the several incidents it is alleged that "neither said distributing facilities nor any part of the distribution space in railway post office cars are required or necessary for the purpose of transporting the United States mail and are not provided as an aid thereto, but solely for the purpose of enabling the Post Office Department to utilize the time in transit for the performance of the administrative function involved in distribution." It is further alleged that between June 1, 1917, and December 31, 1917 (when the roads went under Federal control), and from March 1, 1917, to the filing of the petition the plaintiff, by reason of the act of 1916 and the requirements made thereunder by the Postmaster General has furnished to the United States "over its land-grant mileage and elsewhere on its system of railroads services in addition to the service of transportation," that the extent of the additional space is measured by the proportion which the distribution space in railway post-office cars "furnished as stated," bears to the total space "in [fol. 31] the cars furnished in accordance with the said requirements." The suit is to recover for this so-called additional service, the plaintiff alleging that under the land-grant acts referred to its duty is limited to the duty to "transport" the mails, and that it is not bound to furnish facilities for this "distribution." The payments made to it for the land-grant mileage of its system have been at the rate of 80 per centum of the rates fixed as reasonable by the Interstate Commerce Commission for the service rendered "without distinction as between space provided for transportation of the mails and space provided for distribution," and as a consequence it is claimed that for the periods mentioned plaintiff has been deprived of the sum of \$152,891.91 to which it claims to be entitled.

The act of 1916 provided a method for determining the amount

7 of compensation the carriers should be paid for mail service. It gave the Postmaster General power to state railroad mail routes and authorized mail service thereon for four classes, namely: (1) Full railway post-office car service; (2) apartment railway post-office car service; (3) storage car service, and (4) closed pouch service, and the act defines each. The two first named, it is said, shall be service by cars (of forty feet or more in length in one class and less than forty feet in length in the other class), "constructed, fitted up and maintained for the distribution of mails on trains." It provides that service by these two classes "shall include the carriage therein of all mail matter, equipment, and supplies for the mail service" and the employees of the service. The rate of payment for the service authorized in accordance with this section 5 of the act are stated for each of the four classes of service named, and this statement of rates is followed by the provision:

"Railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress, on the condition that the mails should be transported over their roads at such price as Congress should by law direct, shall receive only eighty per centum of the compensation otherwise authorized by this section."

It is required that all cars and parts of cars used for the Railway Mail Service shall be of "such construction, style, length, and character, and furnished in such manner as shall be required by the Postmaster General," and be constructed, maintained, heated, and cleaned at the carriers' expense. Railroad companies are required to furnish "all necessary facilities for caring for and handling" the mails while in their custody, and to "furnish all cars or parts of cars used in the transportation and distribution of the mails," except as in the act otherwise provided. The act empowers the Interstate Commerce Commission "to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith," and to prescribe the method by weight or space or otherwise and the procedure for such ascertainment of rates and compensation is set forth (p. 429). At the conclusion of the authorized hearing the commission is to establish by order "a fair, reasonable rate or compensation" to be received by the carriers for the transportation of mail matter and the service connected therewith," and this compensation the Postmaster General is authorized to pay out of the proper appropriation. It is also provided (p. 430) that:

11 [fol. 32] "Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination, and thereupon substantially similar proceedings" (as in the procedure above referred to) "shall be had with respect to the rate or rates for service covered by said application."

After conferring on the commission for the purposes of section 5 all the powers it is authorized to exercise in the ascertainment of rates to be paid by private shippers, the act provides (p. 430):

"The Interstate Commerce Commission shall allow to railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress on condition that the mails should be transported over their roads at such price as Congress should by law direct, only eighty per cent of the compensation paid other railroads for transporting the mails and all service by the railroads in connection therewith."

This act makes or authorizes an important change in the method prevailing before its enactment for fixing the compensation of railroads handling the mails. Provision is made, however, for ascertaining just compensation and the procedure required by the act has been followed. The Interstate Commerce Commission has determined upon the space method in lieu of weight. The statute as already stated had provided for payment for service at so much for each mile of service by the different-sized cars. These rates were increased by the commission, and the petition avers that the commission fixed and determined for all services required to be performed by the act of 1916 and performed between the dates of November 1, 1916, and January 1, 1918, rates as follows:

	Cents
	Cents
For each mile of service by a 60-foot R. P. O. car	27
For each mile of service by a 30-foot apartment car	15
For each mile of service by a 15-foot apartment car	10
For each mile of service by a 60-foot storage car	28
For each mile of service by a 30-foot storage space	15
For each mile of service by a 15-foot storage space	8
For each mile of service by a 7-foot storage space	4½
For each mile of service by a 3-foot storage space	2½
For each mile of service by a 15-foot closed-pouch space	10
For each mile of service by a 7-foot closed-pouch space	5
For each mile of service by a 3-foot storage space	2½
For each mile of service by a 7-foot closed-pouch space	5
For each mile of service by a 3-foot closed-pouch space	3

For all of said service required to be performed on and after January 1, 1918, the commission fixed and determined, as fair and reasonable rates for all railroads and for all routes, rates 25 per centum in excess of the scale of rates last above set out. These rates have not been modified.

The Government challenges the court's jurisdiction. It is pointed out that if the action be based upon the act of 1916, a law of Congress, the facts show that the plaintiff has been paid in accordance with that act. If the act itself be not a valid exercise of its legislative power by Congress it would seem doubtful at least whether plaintiff was bound to do what the act enjoins. We think the act is valid

and that Congress intended that the compensation to land-aided roads should be determined and applied as has been done in this case. It is to be conceded that these statutes do not of themselves [fol. 33] devolve every kind of service that may be demanded or enjoined by the department or a statute. But on the other hand these same statutes are not to be so narrowly construed as to render their operation impracticable. When they declare that the mails shall be transported under the direction of the Post Office Department we think they imply more than the mere placing of the mails in bulk in a car to be carried between given termini. The bulk changes by additions to it and subtractions from it. The making of these additions and subtractions as the different stations are reached involve space additional to that occupied by the bulk itself. What is to be transported is not mere weight bulk or freight but the "mails" and the act must be construed to give effect to its purpose.

If the Post Office Department could give no directions relative to the service, the words authorizing them would not be in the statute. Nor do we think the directions thus authorized to be given are to be limited to the methods in vogue in 1853. The price for which the transportation under the direction of the department shall be made is "such price as Congress may by law direct." Whether this price is compensation or not is not the question, but the act of 1916 provides for the ascertainment of just compensation to the railroads for transporting the mails and rendering service in connection therewith. The just compensation thus fixed is not even questioned. Congress did not overlook the question that as to land-aided roads it could fix the price in accordance with the terms of the land-grant statutes. As early as 1876 they provided that land-aided roads should receive only 80 per cent of the compensation authorized by the act of that year, 19 Stat. 82, and the act of 1916 adopts the basis of 80 per cent, but applies it to the compensation which is to be paid other railroads, not alone for carrying the mails but for "all service" by the railroads in connection with transporting them. Manifestly Congress had in contemplation all manner of service which was to be required, and it limited the pay to land-aided roads to 80 per cent of what nonland-aided roads could receive for this service.

Unless this be true it cannot be affirmed that Congress fixed 80 per cent as the compensation for their mere conveyance. Having the right to fix the price for transportation (if the narrow view of that element be adopted), and if it be assumed that the other service, distribution for instance, was additional service that must be paid for at full rate, it is but reasonable to adopt the view that when Congress declared the land-aided road should be paid 80 per cent of the whole compensation fixed for all the kinds of service, its enactment implies that all these different elements were considered. Congress was not required to pay 80 per cent of the cost of transportation. It could have fixed "the price" at less. In certain acts there are provisions that the railroads shall be and remain public highways for the use of the Government, free of toll for the transportation of troops or property of the United States, and under these acts it was

held that the railroad was entitled to be paid for the use of its rolling stock or other personal property. For the actual service the proportion of 50 per cent for the highway and 50 per cent for the transportation was made. See *Lake Superior & Mississippi Railroad Co.* case, 93 U. S. 442. In the Army appropriation acts there will [fol. 34] generally be found provisions relative to payment to land-grant roads and to the effect that such roads for Army transportation shall not receive in excess of 50 per cent of the compensation to other roads for like service. See Army appropriation act, 39 Stat. 633. These instances serve to illustrate our view that by the act of 1916 Congress did not intend that for transportation alone, 80 per cent was to be allowed by the commission. Nor did it say that the commission having ascertained just compensation for a non-land-grant road should allow 80 per cent of a part of such compensation to the land-grant road.

The commission determined the compensation allowable for certain types of cars "for each mile of service," and the statute provides that the land-grant road shall receive 80 per cent of this compensation which the ascertained rate produces for each mile of service. The plaintiff has been paid accordingly. The ascertainment of the compensatory rate and the method to be adopted are confided to the commission and not to the Court of Claims. A carrier dissatisfied with the rates may apply to the commission for a reexamination with respect to the rates for service covered by the application. (Sec. 5, p. 430.) When Congress by this act established certain rates as applicable until action by the interstate Commerce Commission should be had it provided that land-grant roads should receive only 80 per cent of "the compensation otherwise authorized by this section." Congress went further and provided that these roads should receive only 80 per cent of the compensation paid other roads for transporting the mails and all other service. To say it was meant that land-grant roads should be paid for "transporting" the mails 80 per cent of what other roads were being paid for transportation and all service of every kind relative to the mails, and then be paid in addition for these other services, would be a most extreme position. The commission does not seem to have entertained such a view. See *Railway Mail Pay*, 56 L. C. C. 1. They fixed the value of an entire car on the mileage basis. Their decision follows the statutory method and does not itemize the values of the different portions of the car, whether used for one or another purpose. Considering the part of the act which prescribed 80 per cent land-grant roads, the Interstate Commerce Commission says (56 L. C. C. 77):

"It is contended by the railroads that this provision of law should not apply to the distributing space in R. P. O. and apartment cars, because the service of carrying distributing facilities can not properly be construed as transportation of the mails as defined in the law. As a matter of fact, a small quantity of mail is hauled in the racks and partitions of the distributing facilities. Its amount can not be ascertained, because it is constantly changing as the clerks in

charge distribute the mails en route. We are not convinced that Congress intended that services in connection with transporting the mails on land-grant railroads, such as furnishing and hauling distributing facilities, should not be subject to the reduction referred to."

The Act of 1916 was manifestly intended to provide a system for settling the differences between the Post Office Department and the transportation companies, that arose under the prevailing method. To this end the commission was empowered to "fix and determine" [fol. 35] the fair and reasonable rates and compensation for the transportation of "mail matter by railway common carriers and the service connected therewith" and to prescribe the method by weight, space or otherwise, to publish its orders, ascertaining the same, and these orders so made and published to continue in force "until changed by the commission after due notice and hearing." It is not questioned that the commission has discharged this duty and its rates are not objected to. Claiming that its action is based upon a law of Congress, the plaintiff asks to be paid a sum additional to what this same act allows. But we think the claim can not be under the statute and against it at the same time. In order to maintain the action, it is necessary for plaintiff to show a contract express or implied, "or a statute liability on the part of the defendants." *Ludington case*, 15 C. Cls. 453. If the Post Office Department had refused to pay plaintiff compensation fixed by the commission, it could have urged that its action therefor was based upon the law of Congress directing that payments be made in accordance with the commission's decision, but when plaintiff has been paid all the statute allows to be paid the action is not founded on the law. Nor is the action founded on the fifth amendment. See *North American Co. case*, 253 U. S. 330, 335. As we understand its contention, the plaintiff insists that the commission reported that in the different cars the full railway post-office 60-foot car, for instance, the total linear feet of space therein is made up of 36 feet of "distribution space," 8 feet (approximately) "of doorways" and 16 feet (approximately) of "storage space," but ascertained the compensation to be paid for a 60-foot railway post-office car 27 cents for each mile of service by it, and that therefore plaintiff should be paid at the rate of $36/60$ of 27 cents per mile and 80 per cent of $16/60$ of 27 cents for each mile of service, thus confining the land grant element to a supposed value of the "storage space." The commission has not ascertained the values of the space or fixed compensation in the way suggested. They fixed compensation for the car, and all its space. The act authorizes the Postmaster General to prescribe the kind of car and authorizes the commission to fix compensation on the space method. On the other hand, the court is not authorized to prescribe the method or fix compensation, and it can not assume that because the commission fixed a rate per mile for the entire car, it fixed, or intended to fix, a separate basis of compensation for each of the different spaces used in it. As already said, distribution of the mails can not be entirely separated from their transportation. The plaintiff has been paid for the service rendered in accordance

with the rates and compensation fixed by the commission, and, so far as appears, received the payments as they accrued without protest or objection. We think the demurrer should be sustained. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge; and Booth, Judge, concur.

[fol. 36] VII. JUDGMENT OF THE COURT—Jan. 19, 1925

This cause was submitted upon the defendant's demurrer to the plaintiff's petition as amended. On consideration whereof the court is of the opinion that the said demurrer is well taken. It is therefore ordered by the Court this 19th day of January, 1925, that the defendant's said demurrer to the plaintiff's petition as amended be and the same is sustained, and the petition is hereby dismissed.

By The Court.

VIII. PLAINTIFF'S APPLICATION FOR APPEAL—Filed January 26, 1925

From the judgment rendered in the above-entitled cause on the 19th day of January, 1925, in favor of the defendant, the plaintiff by its attorney on the 26th day of January, 1925, makes application for and gives notice of an appeal to the Supreme Court of the United States.

Fred H. Wood, Attorney for the Plaintiff.

IX. ORDER OF THE COURT ALLOWING PLAINTIFF'S APPLICATION FOR APPEAL—Feb. 2, 1925

It is ordered by the court this 2d day of February, 1925, that the plaintiff's application for appeal be and the same is allowed.

[fol. 37]

CLERK'S CERTIFICATE

[Title omitted]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the submission of the demurrer to the amended petition; of the opinion of the Court by Booth, J.; of the opinion by Campbell, Ch. J., referred to in said opinion; of the judgment

of the court; of the plaintiff's application for appeal; of the order of the court allowing plaintiff's application for appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 11th day of February, A. D., 1925.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal.)

Endorsed on cover: File No. 30,873. Court of Claims. Term No. 280. Missouri Pacific Railroad Company, appellant, vs. The United States. Filed February 16th, 1925. File No. 30,873.

(6878)

FILED
MAR 22 1926

WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 280.

APPEAL FROM THE COURT OF CLAIMS.

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant,
against
THE UNITED STATES.

BRIEF OF APPELLANT

FREDERICK H. WOOD,
Attorney for Appellant.

THOMAS W. GREGORY,
of Counsel.



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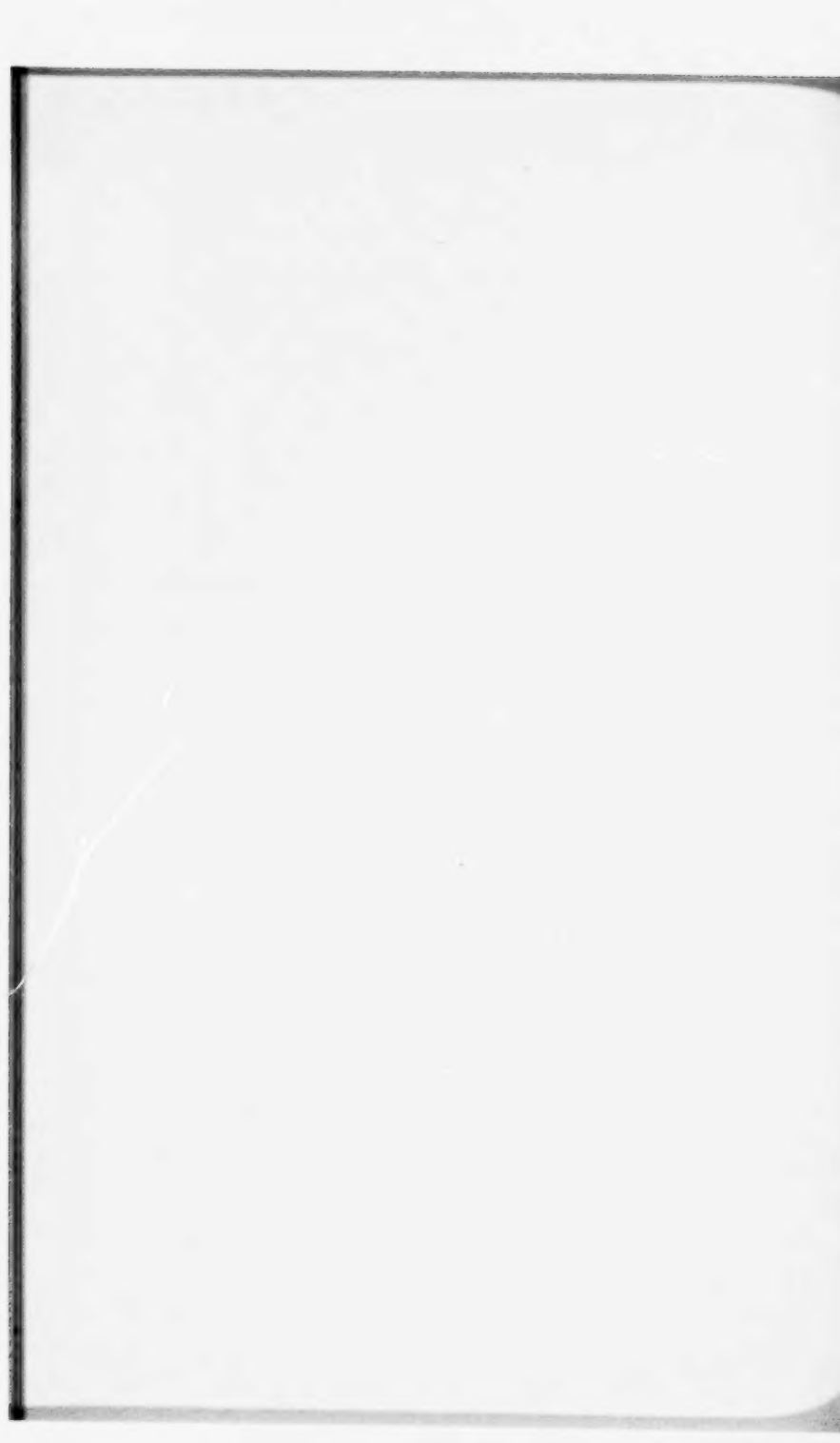
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Supreme Court of the United States

OCTOBER TERM, 1925.

MISSOURI PACIFIC RAILROAD COMPANY,

Appellant,

against

THE UNITED STATES.

No. 280
APPEAL FROM
THE COURT OF
CLAIMS.

BRIEF OF APPELLANT.

The case below is reported in 58 Ct. Cls. 524 (Rec., pp. 17-23) and in 60 Ct. Cls. 183 (Rec., p. 16).

Judgment was entered January 19, 1925 (Rec., p. 23) and appeal allowed February 2, 1925, and the jurisdiction of this Court is invoked under Section 242 of the Judicial Code (R. S. 707) then in effect, authorizing appeals from the Court of Claims to this Court.

Statement of the Case.

This is an appeal from a judgment dismissing plaintiff's petition on demurrer. For a full statement of appellant's case reference should therefore be made to the petition (Rec., pp. 1-16). A brief statement of the nature of the case and the principal facts relied on follows.

Portions of appellant's railroad described in the petition were aided in their construction by two land grants from the United States (Act of Congress, June 10, 1852, 10 Stat. at L. 8; Act of Congress, February 9, 1853, 10 Stat. at L. 155). Each provides that the United States mail shall at all times be transported over said railroads at such prices as Congress may by law direct.*

*The text of these provisions is as follows:

Act of June 10, 1852 (Section 6).

That the United States mail shall at all times be transported on said railroads under the direction of the Post Office Department at such price as Congress may by law direct.

Act of February 5, 1853 (Section 6).

That the United States mail shall at all times be transported on said road and branches under the direction of the Post Office Department at such price as Congress may by law direct.

This is an action to recover compensation for services on appellant's land grant routes withheld by the Post Office Department through the alleged erroneous application of land grant rates as fixed by Congress to services to which appellant claims inapplicable. Prior to the Act of Congress of July 28, 1916¹, (39 Stat. at L. 425, Sec. 5) mail was transported for the Post Office Department under contract, except as carried by land grant roads under the obligations imposed by such land grants. By that Act it was made the duty of all railroads to transport the mails and perform all other services in the Act described to the extent, in the manner and on the trains designated by the Postmaster General. Each day's refusal to perform the service prescribed at the rates provided by the Act was made a separate offense for which a fine of \$1000 was imposed². There is, therefore, absent from this case that element of voluntary acquiescence in rates known to have been fixed by Congress or covered by postal rules and regulations which has been present in some other cases arising prior to said Act.

The Act of July 28, 1916 imposes upon all railroad companies two major obligations: first the duty to transport the mails and second, the duty to furnish railway post office cars for the "distribution" of mails en route as hereinafter described and to transport without additional charge the postal clerks working therein. Railway post office cars are thus described in the petition:

"Railway post office cars are cars constructed in accordance with plans and specifications made or approved by the Post Office Department which, in addition to space provided for the transportation of the mails, contain space occupied by letter cases, tables, racks and other fixtures, hereinafter collectively called 'distributing facilities' which are provided in said cars solely for the purpose of open-

¹This act was passed as Section 5 of the Post Office appropriation bill for the fiscal year ending June 30, 1917 and is reproduced in the Appendix. Because of its length we have separately numbered its paragraphs, for convenience in reference, although there is no such numbering in the original.

²Appendix, p. viii, ¶ 42.

ing of pouches and sacks and distributing their contents and other classes of mail by the agents and employees of the Post Office Department, through the means of the facilities described and according to destination, into appropriate containers for transportation and delivery and are used for said purposes, the said service thus performed being hereinafter described as 'distribution', and the space in said cars occupied by distributing facilities together with that furnished and necessary for the use of said agents and employees of the Post Office Department in making said distribution, being hereinafter referred to as 'distribution space'." (Record, pp. 6-7.)

It is this distributing space in such cars to which this case relates and the furnishing of which the appellant claims is not within the terms of its land grants. The history, origin and use of such cars and of the distributing space therein, the nature of the services performed therein and the relation of the same to the administration of the postal service and to railway transportation service are fully set forth in the petition, the allegations of which for the purpose of this case are to be taken as true.

The administration of the postal service requires first, suitable provision for the receipt of mail matter from the public; second, its assemblage, sorting and distribution into pouches, sacks or other appropriate containers for transportation and in preparation therefor technically known as "distribution" and hereinafter so referred to; third, its transportation; and fourth, its final delivery to addressee. The requirements of the service are also such that redistribution is frequently required between point of receipt and delivery (Petition, Rec. p. 3). By Act of July 7, 1838 (5 Stat. at L. 283) each and every railroad then or thereafter completed was declared to be a post road and the Postmaster General was directed to cause the mail to be transported thereon. For many years after railroads were made post roads and became mail carriers all distribution and redistribution was made in post offices and at

the time of the making of appellant's land grants train distribution and the use of railway post office cars for such purpose were unknown and no such cars were in use or in existence on any railroad in the United States. Thereafter the Post Office Department inaugurated a system whereby a portion of said distribution or redistribution should be made by employees of the Post Office Department in railway post office cars (Petition, Rec. p. 3). Distribution wherever performed is performed exclusively by postal agents and employees, is similar in character and performance, and the extent to which it is performed in stationary post offices or in railway post offices is governed entirely by the distributing policy of the Department and only incidentally by the volume of mail carried (Petition, Rec. pp. 4, 8).

The space occupied by distributing facilities is physically separate from that in which the mail is transported (Petition, Rec. p. 9). Neither the distributing facilities nor any part of the distributing space in railway post office cars is required for the purpose of transporting the mail and is not provided as an aid thereto but solely for the purpose of enabling the Post Office Department to utilize the time in transit for the performance of the administrative function involved in distribution (Petition, Rec. p. 10). Mails not requiring distribution on trains are carried in ordinary baggage cars, their total volume exceeding that carried in railway post office cars. By reason of the large proportion of the space in railway post office cars taken up by the distributing fixtures and facilities only one-third as much mail can be carried in such cars as in ordinary baggage cars. Space and expense are thus increased threefold by their use (Petition, Rec. pp. 9 and 10).

Where railway post office cars are furnished and train distribution performed, railroads, in addition to furnishing and hauling the extra space required, are also required,

without additional charge, to transport the postal agents and employes engaged in the service of distribution, of whom there are sometimes as many as six or seven in a single car (Petition, Rec. p. 8).

Shortly after railway post office cars first came into existence, Congress by an Act of March 3d, 1873 (R. S. 4004) fixed a scale of rates based on weight and distance carried to apply to the transportation of the mail, whether in railway post office cars or in ordinary railroad equipment, and in addition provided for the payment of specified amounts per mile per annum for the use of railway post office cars 40 feet in length or over, graduated according to the length of such car up to a maximum of 60 feet. The scheme of rates then established thus consisted in part of payments for the transportation of the mails irrespective of the type of equipment used, and in part of payments for the facilities furnished in railway post office cars for distribution and may be properly described as a combination weight and space basis. By an act of Congress of July 12, 1876 (19 Stat. at L. 80, 82) it was provided that all railroads which had been aided in their construction by land grants requiring them to transport mails at such prices as might be fixed by Congress should receive but 80 per centum of the compensation accruing to other railroads under the rates of pay authorized by Congress for such other carriers. At that time and down to the passage of the Act of July 28, 1916, railway mail service was performed by all railroads except land grant roads under express or implied contract and there was no statutory obligation upon the part of any railroad other than land grant roads to perform such services. From and after the effective date of the Act of July 12, 1876, the appellant and all other land grant roads received in accordance with said Act but 80 per centum of the rates authorized for payment to other railroads for the transportation of the mails; but, for all services performed in furnishing railway post office cars from the effective date of said Act to November 1, 1916, received the same compensation

accruing to other railroads for the performance of a like service (Petition, Rec. pp. 4-6), although literally construed such land grant roads were entitled under said Act to but 80 per centum of such compensation. That is to say, during all of this period, the defendant recognized that the furnishing of distributing facilities represented a separate and distinct service, not included within the appellant's land grant obligation, but performed by it voluntarily, under express or implied contract, as a service outside of such obligation and for which it was entitled to the same compensation received by other than land grant railroads for the same kind of services similarly performed.

The Act of 1916, in addition to substituting compulsory for voluntary service, made a change in the manner in which pay to be received by railroads for services performed at the instance of the Post Office Department should be determined. The Act of 1916, after declaring that reasonable compensation should be made for all service required by it, directed the Interstate Commerce Commission to fix reasonable rates of pay and method of payment, either by weight, space, both or otherwise as it might determine. It also authorized the Postmaster General, pending decision by the Commission, to inaugurate a space system of pay at rates, temporarily fixed in the Act, on such mail routes as might be selected by the Postmaster General with the approval of the Interstate Commerce Commission, but subject to readjustment at rates and method of pay thereafter fixed by the Commission.¹

Appellant's mail routes were thus duly placed upon the space basis on November 1, 1916. On December 23, 1919, the Commission handed down its decision (*Railway Mail Pay*, 56 I. C. C. 1) continuing the space basis in effect but at rates substantially higher than the temporary rates named in the Act.² The rates so fixed by the

¹Appendix p. v, §30.

²For rates named in statute see Appendix p. i, §8; for rates fixed by Commission see petition Rec. p. 19.

Commission were found by it to be just and reasonable for all railway common carriers in the United States including appellant. The Act also continued the 80 per cent. basis for land grant routes. Between July 28, 1916, when the compulsory service features of the Act became effective, and November 1, 1916, when the appellant's mail routes were placed upon the space basis, the appellant continued to receive the same compensation allowed to other carriers for the furnishing of railway post office cars, at the same time receiving but 80 per centum of the weight rates then in effect for the transportation of the mails. With the establishment of the space basis, the Postmaster General for the first time applied the 80 per centum basis to all services performed over the appellant's land grant routes without distinction as between space provided for transportation and that devoted to distribution, and continued so to do during the whole period covered by the petition. The appellant duly and seasonably protested the application of the 80 per centum basis to compensation accruing from the furnishing of such distributing space and demanded that it receive for such service the same compensation accruing to other carriers (Petition, Rec. pp. 12 and 13).

The Act of 1916 prescribed the service to be performed in terms of railway car service or space. Mails not to be "distributed" en route were to be carried in ordinary baggage cars, and mails to be "distributed" in railway post office cars. The service to be performed in such cars was defined in the Act as "full railway post office car service" or "apartment post office car service", according to whether a full car or a mail apartment in a combination car were to be used. Apartment car service was in turn divided into service in 30 foot apartment cars and 15 foot apartment cars. Full car service and apartment car service are hereinafter collectively referred to as railway post office car service. Railway post office car service, as prescribed in the Act, whether in full cars or

apartments, included both the duty to transport the mails and to furnish the necessary facilities and space in such cars for distribution.

The Act did not itself fix the amount of space in railway post office cars to be devoted to distributing facilities or the nature and extent of the fixtures to be installed therein, nor did it empower the Commission to do so. These were left wholly within the jurisdiction of the Postmaster General. Under these circumstances the space rates, named in the Act itself and as afterwards established by the Commission for railway post office car service, were named to cover the entire service performed in such cars, without division as between space devoted to the transportation of the mails and that devoted to distribution. No specific rates were therefore established to apply to distributing space. The Act neither made provision for a physical division of the space as between the requirements of transportation and distribution, or for a division of the pay between such services. It left the first to the Post Office Department and fixed a rate to cover all services performed in the car. The rates for railway post office car service as for all classes of service, however, were based on the space used, and were fixed at so much per mile of service performed.

The petition alleges that between November 1, 1916 and December 31, 1923 appellant performed 3,438,350 miles of service in full railway post office cars over its land grant routes, 2,082,936 miles of service in 30 foot apartment cars, and 1,089,158 miles of service in 15 foot railway apartment cars; that all of such service was furnished under the authority and at the demand of the Postmaster General and under compulsion of the Act of 1916; that not less than 60% of the space furnished and hauled in railway post office cars, not less than $56\frac{2}{3}\%$ of the space in 30 foot apartment cars, and not less than $46\frac{2}{3}\%$ in 15 foot apartment cars consisted of distributing space furnished and hauled solely for the purpose of dis-

tribution and used therefor; that none of such space was required for the purpose of transporting the mails, or would have been required except for the purpose of enabling the Post Office Department to utilize the time in transit for the performance of the administrative function involved in distribution; that the extent of the service, in addition to that of transportation, thus required of and furnished by the appellant is represented and measured by the proportion which such distribution space is of the total space in such cars; that on account of such services it is entitled under the Act of 1916 to corresponding proportions of the compensation accruing for the service in such cars at the rates fixed therefor, which is likewise declared to be the fair and reasonable value of the service thus performed in such cars in the furnishing and hauling of distributing space and facilities therein; that it has been paid but 80 per cent. thereof and is entitled to recover the remaining 20 per cent. or the sum of \$189,880.54 (Petition, Rec. pp. 9, 10, 13, 14).

Since these services were performed under compulsion, the appellant also seeks to recover the equivalent of interest at 6 per cent. per annum on said amount from its various dates of accrual under authority of *Seaboard Air Line v. U. S.*, 261 U. S. 299.

ARGUMENT

SUMMARY OF ARGUMENT.

I. That the furnishing of distributing space is not within the Appellant's land grant obligation follows from the ordinary and usual meaning of the words employed therein and from a consideration of the nature and purpose of the service itself.

II. The Act of 1916 both in its text and in its legislative history recognizes the distinction between transpor-

tation and distribution and imposes upon railroads the duty to furnish distributing space and facilities as a duty in addition to the duty to transport.

III. Under forty years of contemporaneous construction preceding the Act of 1916 the furnishing of distributing space was not considered by either party to be within the terms of Appellant's land grant contract.

IV. The furnishing of distributing space and facilities cannot be drawn within appellant's land grant contract upon the ground of changed conditions or of convenience and necessity, and Congress is without authority to require the same as an additional service at less than just and reasonable compensation.

V. The fact that a negligible quantity of mails, successively undergoing distribution, is carried in the distributing space, cannot deprive the appellant of its right to reasonable compensation for such space, none of which is necessary for transportation or would be required except for the performance of such distribution by departmental agents in such cars.

VI. The Act of 1916, if fairly susceptible of a construction which will avoid the grave constitutional question involved in the application of land grant rates to distributing space, must be given such other construction.

VII. The Act of 1916 properly construed does not make land grant rates applicable to distributing space.

VIII. For the furnishing of distributing space Appellant is entitled to that proportion of the compensation for Railway Post Office car service at the rates fixed by the Commission, which the distributing space in such cars is of the total space therein, however the Act of 1916 be construed.

I.

That the furnishing of distributing space is not within the Appellant's land grant obligation follows from the ordinary and usual meaning of the words employed therein and from a consideration of the nature and purpose of the service itself.

Unless the services in question are within the obligation created by the appellant's land grant Congress may not require their performance at less than reasonable compensation. The extent of this contractual obligation therefore underlies all other questions in this case.

Webster's International Dictionary defines "transport" thus:

"To carry or convey from one place or station to another; to transfer; as to *transport* goods; to *transport* troops."

Such was the duty undertaken by the appellant under its land grant, viz.: to "carry" or "convey" the mails from one place or station to another.

To that duty has now been added the duty to furnish a specially equipped car, unadaptable for use in any other service that it performs, plans and specifications for which are wholly within the control of the Post Office Department, and which is fitted up with tables, racks and other fixtures similar to those to be found in ordinary post offices for the purpose of enabling the Post Office Department to utilize the time while mails are being transported to empty the contents of sacks and other containers in which individual pieces of mail matter are contained, and redistribute them in other sacks or containers in aid of their final delivery.

As alleged in the petition and pointed out in the statement the postal service involves the performance of four distinct functions, receipt, distribution (meaning thereby in the technical language of the postal laws and regulations not a distribution through carriage and delivery but a separation or distribution of individual pieces of mail matter into appropriate containers for transportation and delivery), transportation and final delivery. Of these transportation alone is the function of the railroad. Each of the other three is admittedly a function of the Post Office Department and carried on by postal agents wherever performed. The distribution performed in these cars is as much dissociated with transportation itself as is the packing of goods for shipment by freight or express. It is not contended that the duty to transport includes the duty to distribute on trains. This service remains a function of the Post Office Department and does not change its complexion according to the place of performance. It being no part of the duty of the railroad to perform distribution service, how can it be contended that the furnishing of the facilities therefor is a part of the duty to transport? So far as the function itself is concerned it is not only performed exclusively by the agents of the postal service but employees of the railroad company are prohibited from entering the cars and the work itself requires such expert and detailed knowledge of mail routes, post offices, etc., as to be incapable of performance by any other than the agents of the department. A large part of the mail distributed in the space furnished goes to points beyond the lines of the appellant's railroad and a considerable part is distributed on its trains for the purpose of making up pouches for letter carriers in important cities both on and off appellant's railroad in order that when the mail reaches such city it may be taken possession of by the individual postman whose duty it is to deliver it from house to house without requiring further sorting at

the post office (Petition, Rec. p. 8). Certainly this is a service entirely foreign to the carriage of mail by the railroad from station to station.

Not the least of the additional duties imposed by reason of train distribution and the furnishing of distributing facilities therefor is the duty to carry postal agents engaged in this work, numbering sometimes six or seven to the car, and to whom the carrier has assumed all of the obligations of a common carrier of passengers for hire, and whom, it is made the duty of railroads to carry without additional compensation. Without the carriage of these postal agents the distributing facilities would be useless and they are not, of course, authorized except on trains to which such postal clerks are assigned. Clearly the duty to carry such clerks can by no stretch of the imagination be regarded as within the duty to transport mails, yet the space in question is furnished solely for the purpose of providing a place within which such clerks may carry on an administrative function of the Post Office Department. According to the Annual Report of the Postmaster General for the fiscal year ended June 30, 1923, there were 18,784 railway postal clerks and 1,399 acting railway postal clerks so carried by the railroads and for whose use this distributing space and these distributing facilities were furnished (*Annual Report of Postmaster General, 1923*, p. 39). The whole purpose is not to provide a transportation facility but space in which these postal clerks may operate a post office, so much so that the Postmaster General has himself aptly described these railway post office cars as "traveling post offices" (*Report of Postmaster General, supra*, p. 38). It appears from the same report that there were 16,666,218,045 distributions and redistributions of mail matter made in these traveling post offices during that year (*Annual Report of the Postmaster General, 1923*, pp. 39-40). The space to which this case relates was a part of the space provided for the distribution of this enormous amount of mail matter by postal clerks working on trains, and none

of which, according to the allegations of the petition, was required or would have been necessary, for the transportation of the mails themselves.

That the duty to furnish such space represents an added and different duty from that embodied in the appellant's contractual duty to carry may be well illustrated by comparing the service performed in these cars with the service performed in the carriage of mail in ordinary baggage cars. A railway post office car consists of two parts, the distributing space wherein the distributing facilities are provided, and storage space wherein mail is carried, the two being physically separate from each other. In a standard 60 foot full railway post office car 36 feet are devoted to distributing space, 16.4 feet to storage space and 7.8 to doorways. Sixty per cent. of the space in the car is therefore devoted and provided solely for distribution. As already noted in the statement, by reason of the performance of distribution in railway post office cars it takes three railway post office cars to carry the same load that may be carried in one ordinary baggage car, wherein mail is carried without distribution and in which type of equipment a larger volume of mail in the aggregate is carried than in railway post office cars (Petition, Rec. pp. 9 and 10). Assuming, for illustration, that the entire volume of mail matter carried over one of the appellant's land grant routes could be *carried* in a single ordinary baggage car, but that, for administrative efficiency in the handling of mails the Post Office Department desires to have all of such mail *distributed* on appellant's trains running on said route, it appears that, in order to meet this requirement of the Department, the railroad company would be required to operate three railway post office cars and in addition thereto to carry therein such number of postal clerks as might be determined by the Postmaster General and assume toward such clerks the obligations of a common carrier of passengers for hire. It would seem plain that the carriage of such mails in one baggage car, or distributed

among as many baggage cars and on as many trains as the Post Office Department might desire, would be a complete compliance with the appellant's obligation to "carry" or "convey" the mails from one place or station to another, and that the additional duty of furnishing three cars instead of one, in order to permit train distribution, represents not only an added duty but one of a totally different kind and character, viz.: the furnishing of a traveling post office for the performance of an administrative function of the Post Office Department.

This illustration also disposes of any argument that might be made that the furnishing of distributing space and facilities is only incidental to the transportation of the mails. It is a separate and distinct service, and, in so far as mails carried in railway post office cars are concerned, their transportation may be more properly regarded as incidental to their distribution.

As pointed out in the statement the extent to which such distribution and redistribution is carried on in railway post office cars depends entirely upon the distributing policy of the department, changes from time to time with changes in such policy and is affected only incidentally by the volume of mail carried. This is illustrated by the fact that, as alleged in the petition, after train distribution had been in effect for a considerable number of years the department established what are known as terminal post offices, (post offices at or near railway stations and at railway centers where mail is distributed for further transportation) and transferred to such terminal post offices a large part of the work formerly done in railway post office cars. During the period covered by the service involved in this case there were approximately 47 such terminal railway post offices wherein the service performed is in all respects similar to that performed in railway post office cars (Petition, Rec. p. 6). At the present time therefore distribution is carried on in part in ordinary post offices, in part in railway post offices and in part in terminal railway post

offices. Wherever it is done the service is the same and the facilities are the same and the extent to which it is done in one place or another is determined by the Post Office Department. It will hardly be contended that, by reason of the establishment of these terminal railway post offices as a substitute for railway post office cars, the land grant obligation of the appellant now includes the duty to furnish station space at less than reasonable compensation for such railway terminal post offices; yet the service performed therein and the occasion therefor, namely, the necessity for redistribution en route between origin and final destination are precisely the same. As to this see *Missouri Pacific Ry. Co. v. U. S.*, 55 Ct. Cls. 38, 485, wherein it was held that a railroad company could not be required to furnish space at stations for the "distribution" of registered mails under a contract to provide suitable and sufficient room for "handling and storing" the mails, and from which the Government took no appeal.

At the time that appellant's land grants were made train distribution and the use of railway post office cars were unknown. Railway post office cars first came into use a short time prior to 1873 (*Preliminary Report and Hearings of the Joint Committee on Postage and Second Class Mail Matter, etc.*, 1914, p. 39), twenty years after appellant's land grants were made. The use of such cars and of train distribution were unknown at the time of these grants. It cannot therefore be said to have been within the contemplation of the parties at the time. Its nature, purpose and origin all indicate that it is a service separate and distinct from that involved in a simple obligation to transport the mails, which was the only obligation the appellant undertook in accepting the land grant made to it. That Congress may impose such additional obligation upon the appellant and all other railroads by law we do not deny. But appellant's obligation to perform services at any rate fixed by Congress

must be limited to the performance of the duties required by its land grants. For any and all other duties it is entitled to reasonable and just compensation.

It would be a mere play on words to hold that because this distributing space is itself transported over the appellant's road the service thus performed is within its obligation to transport the mails without regard to the purpose for which such space is furnished or the use to which it is put. That the purpose and not the place of performance determines the legal status of the service rendered is clear both upon principle and authority, and has been applied by this Court on a number of occasions as applicable to the law of transportation. Thus it has been held that, although a contract for carriage of goods be begun and ended within a single state and therefore, if judged by the place of performance, beyond the power of the National Government to regulate under the commerce clause, it is nevertheless subject to the provisions of the Interstate Commerce act if the purpose is to transport goods definitely intended for further transportation in interstate or foreign commerce (*T. & N. O. R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111; *Railroad Comm. of Louisiana v. T. & P. Ry. Co.*, 229 U. S. 336; *Ohio Railroad Comm. v. Worthington*, 225 U. S. 101). It has also been held that where a service embraced within the transportation duties of a carrier is performed by a shipper at its own place of business it nevertheless remains a transportation service for which the shipper is entitled to be paid by the railroad (*Interstate Commerce Commission v. Diefenbaugh*, 222 U. S. 42). On the other hand, where service is performed by a railroad in a railroad car which is in reality in the nature of preparation for transportation, it is not transportation itself, even though a necessary step to its performance; and thus a shipper has the right to perform such service at his own place of business, as distinguished from the exclusive right of the railroad to per-

form all services actually embraced within transportation. Here, as in that case, the service is one of preparation for transportation and cannot become a part of transportation, merely because it is performed in a railway car (*U. S. v. A. T. & S. F. Ry. Co.*, 232 U. S. 199).

II.

The Act of 1916 both in its text and in its legislative history recognizes the distinction between transportation and distribution and imposes upon railroads the duty to furnish distributing space and facilities as a duty in addition to the duty to transport.

The Act of 1916 begins by classifying the several services, the performance of which the Postmaster General is authorized to require into full "Railway Post Office Car Mail Service", "Apartment Railway Post Office Car Service", "Storage Car Mail Service" and "Closed Pouch Mail Service". Storage mail service is defined as "service by cars used for the *storage and carriage* of mails in transit other than by full and apartment railway post office cars." Closed pouch mail service is defined as "the *transportation and handling* by railroad employees of mails on trains on which full or apartment railway post office cars are not authorized." Storage and closed pouch service take place in ordinary baggage cars and involve the performance of an ordinary transportation service. Full railway post office car service and apartment railway post office car service are each defined as service by cars or apartments "constructed, fitted up and maintained for the *distribution* of mails on trains".¹ In another part of the act it is made the specific duty of all railroads "to *transport* such mail

¹Appendix p. i, ¶¶2-7.

matter as may be offered for transportation by the United States".² The act further provides:

"Railroad companies carrying the mails * * * shall furnish all cars or parts of cars *used in the transportation and distribution of the mails* * * * and place them in stations before departure of trains at such times and when required to do so."³

The act further provides:

"If any railroad company *carrying the mails* shall fail or refuse to provide cars or apartments in cars *for distribution purposes* when required by the Postmaster General, or shall fail or refuse to construct, fit up, maintain, heat, light, and clean such cars and provide such appliances for use in case of accident as may be required by the Postmaster General, it shall be fined such reasonable sum as may, in the discretion of the Postmaster General, be deemed proper."⁴

The act on its face thus distinguishes between the duty to transport and the duty to provide space and facilities for distribution, and in express terms imposes the latter as an additional duty. This precision of language was not accidental. Each of the technical expressions used had a well defined meaning in post office nomenclature and was understandingly and advisedly so used by Congress. The act had been preceded by a succession of Congressional investigations, the last of which was that of a joint committee headed by Senator Bourne and commonly known as the Bourne Commission, which rendered a preliminary report in 1914 hereinafter referred to as the Bourne Commission report (*Railway Mail Pay, Preliminary Report and Hearings of the Joint Committee on Postage of Second Class Mail Matter and Compensation for the Transportation of the Mail, 1914*). This commission recommended the establishment of a space basis of pay and the act of

²Appendix p. vi, ¶31.

³Appendix p. iv, ¶17.

⁴Appendix p. iv, ¶18.

1916 was in reality merely the culmination of the work of that committee, with which Congress was fully familiar. On page 22 of this Bourne Commission report appears a letter written March 21, 1910, by the Postmaster General to the Chairman of the Committee on Post Offices and Post Roads, in which these cars are described as "practically traveling post offices". On page 39 of the same report appears the following extract from a report of another Joint Commission made in 1901 :

"RAILWAY POST-OFFICE CARS"

"Until a comparatively short time prior to 1873 the distribution of the mails in transit was unknown. Prior to the late sixties the railroads simply transported the mails, which were delivered at the post offices and there distributed. Accordingly, 'weight' as the basis of compensation, was at the time of its adoption, and long thereafter, entirely adequate.

For a few years, however, prior to 1873 the distribution of the mails in transit had been practiced to a sufficient extent to satisfy the Post Office Department and Congress that it was a desirable innovation and a branch of the Postal service that should be very much enlarged; but it was recognized that *if the railroads were not only to transport the mail itself but also to supply, equip, and haul post offices for the distribution of the mails*, the compensation upon weight basis that had obtained up to that time was not entirely adequate and just, and therefore the law of 1873, as already indicated, contained a provision allowing additional compensation for railway post office cars. At first these cars were mostly not exceeding 40 or 45 feet in length and of light construction similar to baggage and express cars." (Italics ours.)

On July 25, 1913, the Postmaster General transmitted to the Bourne Commission a letter from Mr. Joseph Stewart, then Second Assistant Postmaster General (*Railway Mail*

Pay, Preliminary Report, etc., supra, pp. 745-7) from which the following is an extract:

“Car space—For closed pouch service and storage mail the Post Office Department requires only the space which is necessary *for the proper transportation of the same*. *For the distribution of mails enroute* it requires a car or apartment in a car specially fitted for the same. This latter requirement is provided for by law. When the needs of the service require 40 feet or more linear space in the car the law permits payment for the space in addition to the payment for the transportation of the mails.” (Italics ours.)

This letter then goes on to point out that the plans and specifications for such cars are wholly within the control of the Post Office Department, that postal clerks are carried therein without additional charge, that such railway post office cars are required to be placed in terminals for distribution purposes in advance of departure for the convenience of the Post Office Department in the expeditious handling of its work. All of these requirements, then rules of the Post Office Department, were carried into the existing statute. The foregoing provisions of the act classifying the service and defining the duties of the railroads originated in a bill recommended for passage by the Postmaster General, in explanation of which Mr. Stewart, then Second Assistant Postmaster General, appeared before the Senate Committee. In the course of his exposition of the technical terminology employed and of the requirements of the proposed bill Mr. Stewart carefully distinguished between the requirements of railway post office and apartment car service on the one hand and of storage and closed pouch service on the other and repeated over and over again that but a small fraction of the space in railway post office and apartment cars was needed for the transportation of the mails but was required solely for its distribution, and

that such distributing space was never authorized or paid for except to the extent required for distribution.*

The act of 1916 effected two changes in the governing law, each of which was equally important. First, it made the performance of the service compulsory instead of contractual and, second, provided for a change in the basis of pay. Under the old contract system railroads performed many services, some of which were provided for in the postal laws and others in the postal regulations, all of which became a part of the obligation of the carrier when a contract was made, but the obligation of which rested upon the contract and not upon any provision of law. In changing from carriage by contract to carriage by compulsion it was therefore essential that it should be made the duty of the railroads to perform all those services essential to the postal administration, which had previously been performed by contract; otherwise the whole postal service would have been demoralized and the rights and obligations of the Government and the railroads respectively would have been rendered uncertain. Congress acted with full knowledge of all the facts and the language to be found in

(*) Among other things Mr. Stewart said:

* * * "I want to submit to you gentlemen the official plans and specifications of these working cars (showing diagram of postal cars). Here is the plan for a 60-foot car, and it shows the amount of space which is used for the different purposes of distribution in the center of the car, and the amount of space at each end of the car in which the mails can be stored. There are 22½ feet of linear space on both sides of the car for storage of mails, as against 120 feet the whole length of the car, 60 feet on each side. Now, the assumption that you can put 20 tons of mail in that car is absurd—the absurdity of it must be apparent to you when you see the plan of the car. No such mail can be loaded in a car of that kind. That car, if a full 60-foot car, carries on the average about 2.8 tons of mail in this storage part. *Little more can be carried because it must all be distributed in the other part of the car. It must be distributed in this space (indicating), and you can not devote to storage mails any greater part of the 60-foot car on account of the necessity for space in which to distribute it.*"

* * * It is largely through carriage. Now here is a view showing the men at work in a car like that, and you can see what this part of the car looks like (showing view of postal car); and at this end up here is the only place where mail can be stored.

The next unit is the 30-foot unit, and there is a floor plan of the 30-foot car. This shows 12 feet of linear space considering both sides of the car—in 60 feet, linear feet of space, on both sides of the car. Now, that 12 feet on both sides of the car (6 feet on each side) is the only space in which mail can be stored, *because all the mail put in there must be distributed in the remaining space.*

the statute was used advisedly and for the purpose of bringing within the compulsory duties of the railroad all those services then being furnished by contract. In thus defining the compulsory duties of the railroads the statute employs the technical term "distribution" in four places. First, in its definition of railway post office cars; second, in the obligation to furnish cars used in "transportation and distribution"; third, in the obligation to provide space and rooms for "distribution of registered mail in transit"; and fourth, in providing that "if any railroad company *carrying* the mails shall fail or refuse to provide cars or apartments in cars for distribution * * * or to construct, fit up, maintain, heat, light, and clean such cars * * * it shall be fined such reasonable sum, etc." The term distribution is employed in every case in precisely the same sense and in the sense in which we have been using it. Those railroad companies, whose duty it is to furnish cars in the distribu-

* * * Here is the plan for the 15-foot unit (showing). This shows still less favorably for loading the car. There are 4 linear feet of space considering both sides in 30 feet, both sides of the car, which is used for mail service. You see how impossible it is to load up those cars in any such manner as has been represented to you, with 10 tons or 20 tons, or any material pro rata part of that weight (pp. 61-2).

* * * Storage-car mails are mails that are put up in closed pouches and sacks, placed in the baggage car, or the storage car, which is furnished especially by the railroad to the department, *which has no furniture or fittings for distribution.*

Senator Hardwick: A whole carload of closed mail sacks?

Mr. Stewart: Yes, sir; it is carried through to a certain point.

* * * Mr. Stewart, Yes. Let us first consider the 60-foot car. In all this service, *where the car is fitted up as a working post office, a large per cent. of the space in the car must be reserved for the handling and distribution of the mails.* In the 60-foot car only 18 per cent. of the floor space can be devoted to storing mails. All the rest of the car must be used by the men distributing the mails. Now, where can 10 tons or 20 tons be loaded in such a car? It is impossible. As a matter of fact, we are now carrying in these cars about the maximum load, because if we were not we would cut down the space. *We never pay the railroad company for a 60-foot car unless we need the space to carry and distribute the mails in; and if we were carrying too small a load on the average in these cars we would reduce the space.* Now, take the 30-foot car (showing plan of car). *Only 20 per cent. of the space in that car can be devoted to loading mails, and that is only 12 feet out of 60 feet of the whole car—both sides of the car.* Where can the load claimed by the railroads be placed? The space for it can not be found. Such loading is impracticable under a practical operation of the service. Let us take the 15-foot unit. *Only 13 per cent. of the floor space in that car can be used for storing mails.* All the rest of it must be reserved for the distribution of the mails by the clerks." (*Hearing of Senate Committee on Post Offices and Post Roads on Post Office Appropriation bill for 1917, pp. 61-2, 69-70.*)

tion of the mails, to provide station space for distribution of registered mail, and upon which fines may be imposed for failing to provide cars for distribution are defined as railroad companies "carrying the mails", thus again distinguishing between the duty to carry and the duty to furnish distributing facilities. The care with which Congress made it the duty to furnish distributing facilities and space for all mail, which the department might elect to distribute on trains and for registered mail in transit at stations, shows plainly that Congress recognized that the furnishing of such space and facilities constituted an additional service which would not be embraced in the imposition of a duty to transport.

If the act had made it the duty of railroad companies to furnish all facilities and men employed in the transportation of the mails no one would contend that this included the duty to provide men to distribute mail on trains. Yet men are as necessary for this purpose as facilities and space, while neither are necessary for transportation. When Congress made it the duty of all railroads carrying the mails to furnish cars to be used for their distribution as well and provided for the imposition of penalties in the event of failure so to do, it clearly recognized that it was requiring the performance of a service in addition to and not necessary for transportation itself.

III.

Under forty years of contemporaneous construction preceding the Act of 1916 the furnishing of distributing space was not considered by either party to be within the terms of Appellant's land grant contract.

Claimant's grants were made in 1852 and 1853 while, as heretofore stated the use of railway post office cars did not begin until a short time prior to 1873. Very soon thereafter (*Railway Mail Pay Preliminary Report, etc.,*

supra,) the Postmaster General was authorized by act of March 3, 1873 (R. S. 4004) "to readjust the compensation" to railroads at a scale of rates for the transportation of the mails according to weight and distance carried and with additional pay for railway post office cars 40 feet in length or over. Under this act payment to land grant roads was the same as to other carriers. By an act of July 12, 1876, (19 Stat. at L. 80, 82) the Postmaster General was again authorized to "readjust compensation" by reducing by 10 per cent. the weight rates established by the Act of 1873, but making no mention of the additional allowances for railway post offices, which therefore stood as fixed by the act of 1873. Section 13 of the Act of 1876 further provided as follows:

"Sec. 13. That railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only *eighty per centum of the compensation authorized by this act.*"

This act of 1876 constituted the only authority of the Postmaster General to make any payments to the railroads for either service and "the compensation authorized" to carriers other than land grant carriers was 90 per cent. of the weight rates provided in the act of 1873 and 100 per cent. of the additional allowances for furnishing railway post office cars for the purpose of distribution. Although the same act provided that land grant roads should receive but 80 per cent. of the compensation thus authorized for others, the Postmaster General applied the 80 per cent. basis only to the weight rates paid for the transportation of the mails and allowed to land grant roads the full additional compensation provided in the act for the use of railway post office cars at 100 per cent. of the rates paid to other than land grant roads for said service. This provision for payment to land grant carriers remained in effect without change until the act of 1916 and was then reenacted

as a part of that act. During all of this time land grant deductions were applied only to compensation made for the transportation of the mails on the weight basis and the appellant and all other land grant railroads were allowed full pay for the additional service performed in the furnishing of railway post office cars for distribution, until the space system of pay was established under the act of July 1916 in November of that year (Petition, Rec. 6). Literally construed the 80 per cent. basis established by the Act of 1876 applied to all compensation authorized, including allowance for the use of Railway Post Office cars. On the other hand Congress could not of course require any land grant road to perform any service not included within its land grant obligation at less than reasonable compensation. The limitation of the application of this eighty per cent. basis to the weight rates paid for mail transportation, and the payment of full compensation for the furnishing of Railway Post Office cars for distribution, for a period of forty years, is therefore explainable only upon the theory that the furnishing of such cars for the purpose of providing distribution space and facilities was not embraced within the land grant obligation to transport the mails, but represented a service in addition thereto. That is to say for forty years the Government construed the appellant's land grant as not including the duty to furnish such space and facilities. Even after the Act of 1916 became effective, in its compulsory service feature, the Department continued to pay full compensation for railway post office car allowances until the space basis of pay was inaugurated in November 1916.

It is our contention that the terms of the land grant are not ambiguous, but that the word "transport" is susceptible of only that definition which comports with its ordinarily accepted meaning and that resort to extraneous aid in interpretation is therefore inadmissible. If, however, a statute is susceptible of more than one construction and has received a contemporaneous construction by the Government, such construction will be followed by the courts

(*U. S. v. Alabama Great Southern R. R. Co.*, 142 U. S. 615; *Edward's Lessee v. Darby*, 12 Wheat. 206; *U. S. v. State Bank of North Carolina*, 6 Peters 29; *U. S. v. Macdaniel*, 7 Peters 1; *Brown v. U. S.*, 113 U. S. 568; *U. S. v. Moore*, 95 U. S. 760).

Section 13 of the act of July 12, 1876, quoted above, provided for the application of land grant rates to railroad companies "whose railroad was constructed in whole or in part by a land grant made by Congress". *U. S. v. Alabama Great Southern R.R. Co.*, *supra*, was a case involving application of this provision to a railroad, a part of whose line was aided in construction by such a grant and the remainder of whose line was not. The question was whether land grant rates applied to the entire railroad or only to the part thus aided. It appears in the statement of the case by the Court that the latter was the construction given to the act by the Postmaster General and by the accounting officers of the Treasury at the time that the act was passed and that the railroad company and its predecessors were paid full rates on non-aided portions from 1876 to 1885 by six Postmasters General, when in the latter year the then Postmaster General reversed the rulings of his predecessors and held land grant deductions to be applicable to the entire line. The Court held that the contemporaneous construction which had thus been given to the act was decisive of the case, saying:

"We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit."

Here the contemporaneous construction relied upon has been continuous for 40 years and likewise consorts with the equities of the case, the changed construction now followed

involving a new departure in the attempted application of land grant rates to services admittedly not necessary to transport the mails and greatly enlarging the duties and expenses of railroad companies beyond those involved in its mere transportation.

It cannot be doubted that under such circumstances neither of two parties to a private contract would be permitted to enforce against the other an interpretation so at variance with its long continued contemporaneous construction. It will hardly be contended that if in 1852 appellant had made a contract with an express company to transport its express matter at such rates as might from time to time be fixed by a Board of Arbitration, had continued so to do until 1873, when, in addition to transporting such express matter, it also provided facilities in its cars for the redistribution and packing of such matter in containers or sacks suitable for the conduct of the express company's business and carried the additional men required for the service, for which additional service additional payment was made until 1916, the express company could be heard to say in that year that the contract rates covered both services. Yet that is precisely what is attempted to be said here.

It may be said that these arguments are weakened because during the 40 years in question, while full pay was made for railway post office cars 40 feet in length or longer, no pay was made for apartment cars of less length. This, however, was true both as to land grant and non-land grant roads and merely means that neither insisted upon its right to additional compensation for a part of the distributing facilities furnished. The performance of this service being voluntary on the part of both land grant and other companies the carriers could of course waive any additional payment to the extent deemed expedient, and this both land grant and non-land grant carriers did. The thing of importance is that to the extent that allowances for such additional service were made to anybody they were made at full rates to all notwithstanding the

fact that under the mail acts land grant carriers were to receive but 80 per cent. of the rates of compensation applying to others. By continuous observance of this practice for 40 years the Government has irretrievably committed itself to that rational interpretation of land grant obligations which comports with the ordinary meaning of the words employed therein.

IV.

The furnishing of distributing space and facilities cannot be drawn within appellant's land grant contract upon the ground of changed conditions or of convenience and necessity, and Congress is without authority to require the same as an additional service at less than just and reasonable compensation.

Appellant's land grants constitute a contract (*Burke v. Southern Pacific R. R. Company*, 234 U. S. 669) which cannot be enlarged by any act of Congress or of the Executive Departments. (*Chicago & Northwestern Ry. Co. v. U. S.*, 104 U. S. 680; *Lake Superior & Mississippi R. R. Co. v. U. S.*, 93 U. S. 442.)

Congress may impose duties other than those named in the contract but not as a part of it or at the rates fixed for contract duties. It is our contention that the Act of 1916 properly construed does not undertake to enlarge the appellant's land grant obligation by requiring it to perform such additional service at less than reasonable compensation. But if it does, then such undertaking is clearly beyond the constitutional authority of Congress. (*Monongahela Navigation Co. v. U. S.*, 148 U. S. 312; *Seaboard Air Line v. U. S.*, 261 U. S. 299; *Van Horne v. Dorrance*, 2 Dallas 304; *Pumpelly v. Green Bay Company*, 13 Wallace 166; *Charles River Bridge Co. v. Warren*, 11 Peters 420; *Minnesota Rate Cases*, 230 U. S. 352). However the

Act of 1916 is to be construed we are therefore thrown back for the determination of this case upon the interpretation to be placed upon appellant's land grant.

The words of the land grant acts themselves are to be construed in their ordinary and popular sense (*Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669 (679), *Lake Superior & Mississippi R. R. Co. v. U. S.*, 93 U. S. 442). Neither by judicial interpretation nor legislative enactment may the duties thereby imposed be extended upon the ground of changed conditions, or of convenience and necessity, to services beyond those fairly within the meaning of the words employed or within the contemplation of the parties. (*Lake Superior & Mississippi R. R. Co. v. U. S.*, *supra*.)

This case involved the interpretation of a land grant to the State of Minnesota to aid in the construction of the plaintiff's road, containing the following provision:

"and the said railroad shall be, and remain, a public highway for the use of the Government of the United States, free from all toll or other charge for (upon) the transportation of any property or troops of the United States."

This act was passed in 1864. The Army appropriation bill of 1874 prohibited payment to any railroad company for transportation of property or troops over land grant lines on condition that the Government should have free use of same, but provided for suits in the Court of Claims in behalf of such railroads. It appears that prior to the passage of this act of 1874 the Government had interpreted similar provisions in other acts as limiting the right of the Government to the free use of the railway but not to free transportation in the trains of the operating company. This question had become of practical importance at the beginning of the Civil War, and it was then ruled by the Secretary of War that while no toll should be taken for the use of the tracks, allowances should be made for equipment, motive power and other services, an opinion

subsequently confirmed by the Attorney General in 1872. From date of enactment until the passage of the Army Appropriation Act in 1874 the Government acted upon this construction. The Court, reviewing the early history of railroads and likewise referring to the interpretation placed upon the act by the War Department, held that the obligation was not to transport free but to furnish a highway for transportation free and that the company was entitled to additional compensation for equipment or other services rendered. In the course of the opinion the Court says (pp. 454-455) :

"The objection that it would be inconvenient for Government to provide locomotives and cars for the performance of its transportation cannot be properly urged. The Government can do what it always has done, without experiencing any difficulty—employ the services of the railroad and transportation companies which have provided these accommodations. It might be very convenient for the Government to have more rights than it has stipulated for; but we are on a question of construction, and on this question the *usus loquendi* is a far more valuable aid than the inquiry what might be desirable.

Equally untenable is the idea, that, because railways are not ordinarily used as public highways, therefore the appellation of 'public highways', when given to them, must mean something different from what it has ever meant before, and must embrace the rolling stock with which they are operated and used. Such a method of interpretation would set us all at sea, and would invest the courts with the power of making contracts, instead of the parties to them."

As already pointed out, these land grants antedate train distribution by nearly twenty years. The fact that train distribution is now commonly practised and may be convenient, or even necessary to the administration of the postal service, cannot make the furnishing of facilities therefor and the carriage of the men engaged therein a

part of the contract then entered into. This is not a case in which the Government is seeking the application of modern transportation methods, commonly practised for all, to the transportation services performed for the Government. It is seeking to draw within an obligation to "transport" the property, carried as the mails, a duty to provide space and facilities for the conduct of the Government's own business and to transport men as well as mails for such purpose. The service sought to be included under the duty to "transport" is not within the ordinary meaning of the word employed, or within any definition of transportation to be found in any statute, including the mail acts themselves. It has neither counterpart nor analogy in any service rendered to any other patron in the performance of transportation duties. The space and facilities in question are not necessary for the purpose of transporting the mails and are not provided as an aid thereto, but solely for the purpose of enabling the Post Office Department to utilize the time in transit for the performance of the administrative function involved in distribution. The men carried in such cars are not carried to assist in the transportation of the mails but to perform this administrative function there instead of having it done in ordinary post offices. Unless the ordinary and popular meaning of the words employed is to be entirely disregarded, the performance of such service would fall outside the land grant obligation of the carrier even though train distribution had been in use at the time the grants were made. This suggestion is supported by the practical interpretation placed upon this and similar land grants, irrespective of their dates, for a period of forty years. It is also supported by the care with which Congress by the Act of 1916 imposed upon all railroad companies the duty to provide this service as a duty in addition to that involved in the transportation of the mails, and at a time when railway post office cars and train distribution had been in common use on all railroads for many years.

However this may be, such service was unknown at the time of appellant's grants and therefore could not have been within the contemplation of the parties. Congress may, as it has, impose upon all railroads, including land grant railroads, the duty to provide such distributing space and facilities as a duty in addition to the duty to transport, but only at reasonable compensation, and for the performance of such additional service land grant roads are entitled to the same reasonable compensation paid to others.

In *Hollerbach v. United States*, 233 U. S. 165 (171) the Court said :

"A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument. * * *"

Thus interpreted, it is plain that the services in question are not within the appellant's land grant and cannot be drawn thereunder upon the ground of changed conditions or of governmental convenience.

In *U. S. v. Stage Co.*, 199 U. S. 414, it was held that the same principles of right and justice which prevail between individuals should control the construction and carrying out of contracts between the government and individuals. In that case the Stage Company had agreed to carry all mails between post offices in New York City and all railway stations at a stipulated amount per annum, including all additional service which might be required during the life of the contract beyond that then being performed, and, among other things specifically agreed to perform all such additional service, if any, which might be due to a change in the location of post offices or stations. Shortly after the Stage Company entered upon the performance of the contract the Post Office Department changed the location of certain post offices in New York and under its terms de-

manded that the Stage Company perform the additional service required by such change, the effect of which was to increase the service nearly 100 per cent. beyond that which would have been required but for such change. The Court held that notwithstanding its agreement to perform all additional services due to change in post office location the Stage Company was entitled to recover the value of the additional services performed and the contract could not be fairly or reasonably construed as imposing upon the contractor such an extraordinary increase in the service as became necessary by such changed locations.

The doctrine of this case has been twice recently reaffirmed (*Hunt v. United States*, 257 U. S. 125; *Freund v. United States*, 260 U. S. 60, 43 Sup. Ct. Rep. 70). In the *Freund* case claimant contracted in writing to carry the mails to and from the new St. Louis Post Office, then under construction, for a period of four years beginning July 1, 1911, the Postmaster General reserving the right in the contract to increase or decrease the service required, to extend the same to any new location of post offices, and to establish service to and from like offices, landings or points not named in the contract, compensation to the contractor to be increased or decreased in the event of such changes in service at the rate per mile governing the original contract. The new post office not being ready for occupancy until sixteen months after July 1, 1911, the old post office, which was thirteen blocks from the new one, continued to be used. Under duress of threatened suit on his bond the contractor complied with the orders of the department to perform the additional service required to and from the old post office by reason of the failure to have the new one ready for occupancy on July 1, 1911, and performed services demanded at a cost of \$43,726.89, for which he was paid under the contract \$24,289.62. The service bid on required six automobiles. The restated service required 18 wagons of different

capacity exceeding several times in aggregate capacity that required for the bid on service and placed other onerous duties upon the contractor not required by the service bid on. This Court held that while the construction relied upon by the Government was permissible the service was not fairly within the contemplation of the parties, that to give to the contract this construction would be unconscionable, and that claimant was entitled to recover on *quantum meruit*. It also held that although the contractor had acquiesced in the performance of the service such acquiescence was under duress and did not deprive him of the right to reasonable compensation. In this case the claimant has performed the services under duress of fines and penalties provided by the statute for non-performance of services, which have had the effect of increasing by two or three times the volume of service and expense of conducting the same beyond those required for the mere transportation of the mails. In the *Freund* case the Government from the beginning contended that notwithstanding the increased burden of the service claimant was required by contract to perform it. In this case for 40 years the Government has acquiesced in an interpretation of the carrier's land grant contract whereby the performance of these services is excluded therefrom.

In this case, as in each of the two cases cited, the additional service in question has greatly increased the burden and expense of the contractor. This case is, however, stronger than either of those cited, because in those cases the additional service required was within the literal reading of the contract while here it is not.

On every principle, governing the interpretation of statutes and contracts, it is clear that the furnishing of such distributing space and facilities and the carriage of postal clerks therein are not within the appellant's land grant obligation, and that it may not be required to provide such service at less than reasonable compensation.

V.

The fact that a negligible quantity of mails, successively undergoing distribution, is carried in the distributing space, cannot deprive the appellant of its right to reasonable compensation for such space, none of which is necessary for transportation or would be required except for the performance of such distribution by departmental agents in such cars.

The opinion of the Court below (Rec. p. 21) refers to the report of the Commission in which it is stated that in fact "a small quantity of mail is hauled in the racks and partitions of the distributing facilities", the amount of which "cannot be ascertained because it is constantly changing as the clerks in charge distribute the mails en route". Of necessity mails which are distributed on trains are hauled in the distributing facilities while undergoing distribution. Otherwise train distribution could not be performed. An extract from the testimony of the Second Assistant Postmaster General, before the Senate Committee, explaining the operations of the bill, is set forth in the footnote at page 22 of this brief. In explaining why more mail could not be carried either in the transportation or storage space of a full post office car, or in the car as a whole, the Second Assistant is quoted in such extract as saying:

"* * * Little more can be carried because it must all be distributed in the other part of the car. It must be distributed in this space (indicating), and you can not devote to storage mails any greater part of the 60-foot car on account of the necessity for space in which to distribute it."

He then went on to say that all mail put in the storage space of an apartment car must also be distributed in the remaining space, that is, the distribution space. There is thus a constant flow of mail into and out of the distribut-

ing space as the mails carried in the storage space are successively distributed. This constant flow back and forth also necessarily limits the amount of mail that can be carried in the storage or distribution space, as compared with the amount of mail which could be carried in such space solid, if its distribution en route were not required. *The petition alleges that none of the distributing space is necessary or required for the transportation of the mails,* and this statement must be taken as true for the purposes of this case. Its truth is fully corroborated by the foregoing quotation, although such corroboration is unnecessary in a case to be determined on demurrer.

If the practice of train distribution, with its accompanying distributing space and facilities, made no substantial increase in the space and expense requirements of the carrier, its effect might be regarded as *de minimis*. Since the space and expense involved are three-fold that involved in transportation alone, and since none of the space in question is necessary or required for the transportation of the mails, the fact that a negligible quantity of mail while undergoing distribution is carried in the distributing facilities, can have no bearing upon the right of the appellant to claim compensation for the extra service, required for distribution, and which would not be required except for such purpose. The petition alleges and a description of the service and space required, on its face, show that this space is not furnished for transportation or as an aid thereto, and is not necessary therefor, but is furnished solely in order that the Department may utilize the time in transit for the performance of its administrative function of distribution through railway mail clerks carried in such cars without any added compensation. Unless substance is to be entirely disregarded, the fact that a negligible quantity of mail is thus of necessity for a short space of time both transported and distributed in the distribution space cannot operate to deprive a land grant carrier of its right to reasonable compensation for the additional service performed in furnishing such space and in transporting men therein as well as mails.

VI.

The Act of 1916, if fairly susceptible of a construction which will avoid the grave constitutional question involved in the application of land grant rates to distributing space, must be given such other construction.

That the Act of 1916, if construed as an attempt to impose upon land grant roads the duty to furnish distributing space and facilities at less than reasonable compensation, is clearly unconstitutional admits in our opinion of no doubt for the reasons already advanced. In any event the constitutional question raised is not frivolous but grave and serious. Under these circumstances a construction, if permissible, should be placed upon this Act under which the constitutional question thus raised may be avoided.

In *United States v. Jin Fuy Moy*, 241 U. S. 394, 401, the Court said:

“A statute must be construed, *if fairly possible*, so as to avoid not only the conclusion that it was unconstitutional, but also grave doubts upon that score.” (Italics ours.)

In *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 407, Chief Justice WHITE said:

“While the grave questions thus stated must necessarily, as we have said, arise for decision if the contention of the government, as to the meaning of the commodity clause be correct, we do not intend, by stating them, to decide them, or even in the slightest degree to presently intimate, in any respect whatever, an opinion upon them. It will be time enough to approach their consideration if we are compelled to do so hereafter, as the result of the further analysis which we propose to make in order to ascertain the meaning of the commodities clause.

It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably

susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars Indemnity Co. v. Jarman*, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional, and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman v. Interstate Com. Commission*, 211 U. S. 407."

In *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 422, the Court said:

"If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts, so far as candor permits. *Knights Templar Indemnity Co. v. Jarman*, 187 U. S. 197, 205."

In *Knights Templars' & Masons' Life Ind. Co. v. Jarman*, 187 U. S. 197, 205, the Court said:

"Were the act of 1887 more ambiguous than it is as to its application to past transactions, we should still be disposed to apply the cardinal rule of construction, that where the language of an act will bear two interpretations, equally obvious, that one which is clearly in accordance with the provisions of the constitution is to be preferred. *Endlich Statutes*, Sec. 178. This rule was applied by this Court in *Granada County v. Brogden*, 112 U. S. 261.

Presser v. Illinois, 116 U. S. 252, 269, and *Hooper v. California*, 155 U. S. 648, 657.

We do not wish to be understood, however, as expressing an opinion upon the constitutionality of the act of 1887, if it were applied to prior policies,

but simply as holding that, in view of the language of the act, and the doubtfulness of its constitutionality as applied to prior policies, it should only be given effect in cases of policies thereafter issued."

It is needless to review other cases cited in the above decisions, or to invoke additional authority in support of this proposition.

VII.

The Act of 1916 properly construed does not make land grant rates applicable to distributing space.

The provision in the act of 1916 fixing land grant rates at eighty per centum of the reasonable rates established by the Commission was in effect a mere reenactment of the existing practice founded upon the act of 1876. It contains two provisions relating to payment to land grant roads, one a reenactment in terms of the act of 1876 and the other a reenactment of its substance. For convenience in comparison we set out these provisions in parallel columns:

ACT OF 1876.¹

SECTION 13.

+ (Reenacted in Act of 1916)

That railroad companies whose railroad was constructed in whole or in part by a land-grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only eighty per centum of the compensation authorized by this act.

ACT OF 1916.²

(New provision)

The Interstate Commerce Commission shall allow to railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress on condition that the mails should be transported over their roads at such price as Congress should by law direct only eighty per centum of the compensation paid other railroads for transporting the mails and all service by the railroads in connection therewith.

¹Appendix p. ii, ¶ 9.

²Appendix p. vii, ¶ 39.

As we have seen, the act of 1876 was construed for 40 years by the Post Office Department as applicable only to payments for the transportation of the mails and as inapplicable to payments made for the additional service involved in the furnishing of railway post office cars for distribution. The new provision of the act of 1916 literally construed is no more sweeping in its application to all services performed by land grant carriers than was the act of 1876. On the contrary, as will appear by reference to other provisions, it is susceptible on its face of an interpretation excluding the application of land grant rates to distributing space, of which the earlier act was on its face not susceptible. The subject matter of both acts is the same, to wit: payment to land grant carriers for services consisting in part of transporting the mails and in part of furnishing distributing facilities. Under both statutes their pay is fixed at 80 per cent. of the compensation authorized to be paid to other carriers. Under the act of 1876 the compensation thus accruing to other carriers consisted of payments for transportation at weight rates and of additional payments for distributing facilities provided through the furnishing of railway post office cars. Literally construed the 80 per cent. land grant basis was to apply to all of the compensation which would accrue but for a land grant contract and not merely to a part of it. Even assuming the direction in the act of 1916 for the payment of "80 per centum of the compensation paid other railroads for transporting the mails and all service by the railroads in connection therewith" to be broad enough to embrace all service performed, whether of such a character as to be directly connected with transportation and which partake of a transportation character or merely connected therewith in the sense of being simultaneously performed, the act of 1916 is no more all-embracing than that of 1876.

The rule that in reenacting a statute the legislature adopts its prior construction extends to those cases where

the existing act is reenacted in substance but not in identical language (*Barrett's Appeal*, 73 Conn. 288; *Grier v. State*, 103 Ga. 428; *Kelly v. Northern Trust Co.*, 190 Ill. 401; *McGann v. People*, 194 Ill. 526; *Breckenridge v. Commonwealth*, 97 Ky. 267; *Wetherbee v. Roots*, 72 Miss. 355; *State v. Cornell*, 54 Neb. 647), and to cases where the statute has received a practical construction on the part of those charged with its execution, as well as where it has been construed by the courts (*State v. Cornell*, *supra*; *Bloxham v. Consumers' Electric Lt. & St. R. R. Co.*, 36 Fla. 519; *Commonwealth v. Grand Central B. & L. Assn.*, 97 Ky. 325). Reading these two acts together it is clear that Congress intended no more than to preserve the existing practice based upon the use of similar language in the act of 1876. The slight change in phraseology in the new provision certainly evinces no purpose either to enlarge land grant obligations or to change the then existing relation of pay as between land grant and other roads. Thus construed the 80 per cent. basis applies as before to those services within the land grant obligation and to no others.

Indeed the fact that Congress included both of the foregoing paragraphs in the Act of 1916 is internal evidence it had no thought of enlarging the obligations of land grant carriers or making any change in their basis of pay since the Act of 1916. There is no reason to assume that either of these two provisions in the existing act means anything different from the other and if it does it is impossible to determine which one applies. Each is all-embracing, each relates to the same subject-matter. The first is a reenactment in terms of the provisions of the Act of 1876, and the second a reenactment thereof in substance as applied specifically to the rates established by the Commission.

Nor does this interpretation leave the phrase "all service by the railroads in connection therewith" *functus of-*

ficio. There are many incidental services required of railroads in connection with the transportation of the mails, and to which this expression may properly be applied without extending it to the totally distinct service of providing distribution space and facilities. The act of 1916 requires the railroads to furnish all cars necessary for the transportation of the mail, to "furnish all necessary facilities for caring for and handling them while in their custody", to "provide station space and rooms for handling, storing and transfer of mails in transit, including the separation thereof by packages for connecting lines * * * and for offices for the employes of the railway mail service engaged in such station work", to transport as mail matter at the rates provided therefor "postal cards, stamped envelopes, newspaper wrappers, empty mail bags, furniture, equipment, and other supplies for the postal service", to "transport the mails on any train designated by the Postmaster General", whereas carriers generally themselves determine on what trains property committed to them shall be carried.* Under the duty to carry, handle and care for the mails, railroad companies under postal regulations load and unload mails shipped in solid carloads whereas other carload shipments of other property are loaded and unloaded by the shipper, and whereas in the carriage of express on the same trains this service is performed by express company employes (*Railway Mail Pay, supra*). For the most part this enumeration of duties corresponds closely to the duties embraced in the term transportation in the interstate commerce act, which, generally speaking, includes the furnishing of necessary cars, the care and handling of the property and the performance of other services necessary and incident to its transportation. All of the services enumerated above have been performed by the railroads for many years as services embraced within the weight rates paid for transportation and on which land grant rates have always been applied.

*Appendix p. iv, §§ 17, 19; p. v, §§ 27, 28.

Whether in order to insure a continuance of the existing practice it was necessary for Congress to enumerate these incidental services directly connected with transportation and to provide that land grant rates should in the future as in the past apply to the payment for these incidental services, whether embodied in a single rate covering them as well as actual transportation, or whether separately fixed, it is unnecessary to consider. Congress did so and we are not challenging the propriety of their inclusion within the duty to transport as necessary and incidental thereto. The mere enumeration evidences the existence of numerous services connected with transportation itself, a part of which might be performed either by the carrier or the department, but all of which are necessary or incident to transportation and connected therewith.

The limitation of land grant rates to services so connected with transportation as to be necessary or incidental to transportation itself also comports with the context. This provision of the act applies in terms only to those railroads constructed on condition that the mails should be transported over their roads at such price as Congress should by law direct. It therefore rests wholly upon the contractual obligation to transport. It applies to those roads bound by such contractual obligation and to no others. It was enacted solely in the enforcement of such contracts. It employs the phraseology of the land grant acts, themselves. There is nothing to indicate that Congress intended to enlarge such contractual obligation even if it had the power to do so.

Finally, Congress is never to be presumed to have intended to exceed its constitutional authority or to enact a law giving rise to grave constitutional questions. Only when no other interpretation is possible is such a construction permissible. Congress is always supposed to be cognizant of its own constitutional limitations. Bearing in mind these limitations and reading this act in the light of the long continued administrative interpretation

of that part of the act of 1876, of which it is a reenactment, and in light of the context, it is clear that Congress intended to make 80 per cent. of standard compensation apply to all those services fairly within land grant obligations and to no others. The statute is not only fairly susceptible of this interpretation, but it is the more rational of the two.

VIII.

For the furnishing of distributing space Appellant is entitled to that proportion of the compensation for Railway Post Office car service at the rates fixed by the Commission, which the distributing space in such cars is of the total space therein, however the Act of 1916 be construed.

As we have said, Congress did not fix specific rates for distributing space, neither did it fix the amount of space in railway post office cars to be devoted to distributing facilities or prescribe the nature and extent of the fixtures therein, nor did it empower the Commission so to do. All these matters, as well as the extent of other services and facilities to be furnished, were delegated exclusively to the Postmaster General. The Act fixed a single rate to apply to both services performed in such cars, leaving it to the Postmaster General to determine how much of the space therein should be devoted to the one service or the other. In fixing its scale of space rates the Commission followed the statutory method and established rates applicable to the entire service in railway post office cars, leaving to the Postmaster General the determination of the amount of space in such cars to be devoted to transportation and

distribution respectively, and over which the Commission was given no control. It followed the same course as to other classes of services, fixing rates conforming to the classes and units of service prescribed in the Act, which were expressed in terms of railway car service or space.

In the opinion of the Court of Claims (Record, p. 21) comment is made upon the fact that the rate for each of the several units of railway post office car service is fixed as an entirety and that the rates fixed by the Commission follow the statutory method and do not itemize the values of the different portions of the car whether used for one purpose or another. If by this it is meant to suggest that, because the rate for a railway post office car is fixed as an entirety, the appellant or any other land grant carrier is deprived of its right to reasonable compensation for so much of the service performed in such car as falls outside its land grant obligation and must accept 80 per cent. thereof, it is respectfully submitted that the suggestion is wholly untenable. The constitutional right to fair and reasonable compensation cannot be thus lightly destroyed.

It is also suggested in the opinion of the Court of Claims that the appellant might have refused to perform railway post office car service under this Act and scheme of pay. In this again the Court of Claims erred. The performance of such service was made compulsory on all railroads. The appellant had no option and waived no rights by performance (*Chicago & Northwestern Ry. Co. v. U. S.*, *supra*, pp. 686-7). That Congress had the right to make it compulsory it is believed admits of no doubt. Fines and penalties are imposed for disobedience and the service was manifestly performed under duress of law. It was appellant's duty to perform the service. It is the correlative duty of the Government to pay reasonable compensation for such service except as covered by land grant obligations. The Act itself, recognizing this duty, provides that reasonable and just compensation shall be made

for all the service required to be performed by the Act¹. If the furnishing of distributing facilities is not within the land grant, the appellant clearly has failed to receive for such services reasonable and just compensation either as defined in the Act itself or otherwise, since it has been paid for all service performed in railway post office cars but 80 per centum of the rates prescribed as just and reasonable for the use of such car as an entirety.

The fact that both the statutory scale and the Commission scale, which followed it in fixing rates applicable to the units of service prescribed by the act itself, named rates applicable to the entire service performed in railway post office car service affords no legal or practical obstacle to the payment of just and reasonable compensation for such service. Indeed, looking at the Act as a whole and at the basis upon which the rates established thereunder were fixed as well, it seems plain that the appellant is entitled to recover that proportion of the compensation accruing from the use of such cars as a whole at the rates fixed, which the distribution space is of the total space therein, and that any attempt to fix specific rates for distributing service would have been inconsistent with the scheme and purpose of the Act and would have interfered with its practical administration.

In changing from a voluntary to a compulsory system of service, it was necessary for Congress first to prescribe the service required. This it did in terms of railway car service or space, both as to railway post office car service and all other classes of service. With respect to railway post office car service, it made it the duty of the carriers to furnish the necessary distributing space and facilities as well as to transport the mails but did not designate the extent to which such space or facilities should be provided in any particular type of equipment. It was necessary, second, for it either to determine the extent of service to

¹Appendix p. vi, ¶ 31.

be performed or to fix the means for such determination. This it did by leaving the same to the Postmaster General, including the power to determine the extent and nature of the distributing space and facilities to be provided in railway post office cars. It was also necessary for Congress to provide for the payment of reasonable compensation for all of the services prescribed. In meeting this requirement it first declared that just and reasonable compensation should be paid for all services performed under the Act. Having done this, the Act then fixed a temporary scale of space rates applicable to the several classes and units of car service prescribed under the Act, graduated according to space, and to apply upon such routes as might be temporarily placed upon the space basis, pending the determination by the Commission as to the basis and rates of pay which it was empowered ultimately to fix. No control over the service, over the construction or specifications for railway post office cars, over the amount of distribution space, or over character, or extent of distributing facilities therein was delegated to the Commission. The Act thus clearly marks out those matters prescribed by the Act itself, and those matters left within the control of the Postmaster General and the Commission respectively. What the Act itself prescribed could not, of course, be altered by either except as power to change was expressly delegated. All matters of service and the extent of facilities to be provided, whether in railway post office cars or elsewhere, including the right to require railway companies to furnish space in stations for the distribution of registered mail as well as space in railway post office cars for distribution on trains, and the extent of space to be provided for either were delegated exclusively to the Postmaster General. The Commission's sole function was to determine rates to be paid for the services prescribed in the Act and to the extent authorized by the Postmaster General.

Neither was the Commission given any authority to fix rates for land grant routes as such. Its duty was to fix reasonable rates for all carriers, whether performing services under land grant or otherwise. For land grant services the Act itself fixed the basis of pay at 80 per cent. of that fixed under the Act for others. The Commission completed its duty when it established reasonable rates for all carriers, declared by it to be just and reasonable for all mail routes, including those of the appellant. With this done the application of the 80 per centum basis to so much of the services embraced in such rates as were covered by land grant obligations became automatic. It is true, as stated by the Court of Claims, that the Commission interpreted the 80 per cent. basis as applicable to all services covered by the Act, including the furnishing of distribution space and facilities. The Commission, however, having no authority to change the basis for payment of land grant carriers, its declaration represented merely its own view of the law not binding upon either the carriers, or the Postmaster General. If it had held to the contrary, the Postmaster General could have refused payment of more than 80 per cent. of the compensation accruing on account of the furnishing of distributing facilities, asserting that the Act itself provided that that was all that land grant carriers should receive. In any litigation which might ensue it would be the duty of the Court to construe the Act and the Commission's determination of the legal question involved would not have been conclusive upon either the courts or the parties. The appellant protested the Commission's interpretation as well as payment on the 80 per cent. basis, although the service being compulsory, no protest was necessary (*Chicago & Northwestern Ry. Company v. U. S., supra*).

Assuming, therefore, that performance of these services is not within appellant's land grant, the sole remaining question is upon what basis should it receive compensation therefor? Clearly, as we think, upon the basis of

that proportion of the compensation accruing under the Act, for railway post office car service, as a whole, which the proportion of distribution space in such cars is of the total space.

To have fixed specific rates on a space basis for distribution space, without at the same time prescribing the amount of distribution space to be provided, would have been inappropriate and inconsistent with the Act and the division of powers therein contained. To have fixed a uniform rate for distribution space in all post office cars or apartments of a given size it would have to be assumed that the arrangement of all such cars was uniform, and the division of space between distribution and transportation space in all was the same. Otherwise, the rate would have been too high for some and too low for others, and would have represented an arbitrary figure inconsistent with the theory of adjusting pay to the space used. The carriers' mail equipment is the result of 40 years' growth, and any assumption of uniformity upon the part of Congress would have been wholly untenable. Indeed, the presumption is quite to the contrary. Furthermore, the Postmaster General may at any time revise existing standard specifications and increase or reduce the amount of space to be occupied with distributing facilities. He may at any time arrange with a railroad for the construction or alteration of a car in which more or less space is so occupied. A fixed rate would give rise to confusion in such cases and would have infringed upon the prompt, flexible and orderly exercise by the Postmaster General of the control over such equipment, vested exclusively in him, and in adjusting service to requirements. In any event, no effort was made to name specific rates for uniform application to all distribution space in each of the three classes of railway post office cars defined in the Act, or for the different varieties of such cars then in use, or which might afterwards be provided. A single rate was named for the entire space in the car, the disposition of which was left to be determined by the Postmaster General, as were all other matter of service and facilities.

Nor was it necessary to undertake a division of the pay accruing from such cars in the fixing of a scale of reasonable rates in order to provide reasonable compensation for so much thereof as was devoted to distribution. The scheme provided is a space basis of pay. The argument pressed both upon Congress and the Commission in favor of the space basis was that the weight of the load carried in passenger train cars, whether mail, baggage, express or passengers, is so negligible as compared with the weight of the equipment itself as not to be a factor in determining the cost of the service, which can be most accurately determined upon the basis of the space devoted to the several classes of service performed. The rates fixed represent a scheme of space rates designed to compensate the carrier upon the basis of cost plus a fair return and in which the value of the service to the user as a separate factor is wholly ignored. Under such a scheme the rate applicable to the operation of a full 60 foot car, is based upon the assumed cost of transporting the passenger train space represented by such car and that proportion of the compensation earned on such car, which is applicable to the furnishing of distributing facilities, is directly represented by the proportion which the space occupied by such distributing facilities bears to the entire space in the car. No other conclusion is logically possible.

The rates fixed are at so much per mile for each of the several units. Total compensation for any unit of service on any route is determined by multiplying the rate by the miles run. The petition alleges that the rates fixed by the Commission were

“based upon statistical ascertainment of the cost of transporting the mails and of performing the additional services hereinbefore described, as determined by the proportion which the space furnished and provided for said service bore to the total space involved in passenger train operation and that the reasonable compensation thereby fixed for each of the several classes of service required to be per-

formed by the act of July 28, 1916 was measured and determined solely by the occupied and complementary space required to be furnished in connection therewith and graduated according to the amount of space authorized to be furnished in accordance with said act" (Rec. p. 12).

Indeed, reference to the opinion of the Commission will show that the cost unit employed by it in the determination of the rates prescribed was not the cost per mile but the cost per car-foot mile, including within the car-foot miles assigned to the various classes and units of service prescribed in the act not only the occupied and authorized space but such empty space as was required to be hauled in connection therewith, or its proportion of such empty space, as in the case of mixed cars which were used for more than one class of traffic.* The rates fixed by the Commission for a full 60 foot railway post office car therefore were fixed upon the theory that the cost per car foot mile of every foot of space in such car was the same and that the rate established for such car represented what may be termed the aggregate cost of furnishing and hauling 60 feet of space in a car of such description and type. Indeed, the whole theory of the space scheme of pay is that the value of each foot of space in a given car, or part thereof, prescribed for use in the act is the same.† The

*See discussion of cost and review of statistical data (*Railway Mail Pay, supra*, pp. 26-44) and the numerous tables therein contained in which the space, devoted to passenger, mail and express and to the several classes of railway car service, performed in connection with the mails, is set forth in terms of car foot miles and the cost allocated on that basis.

†The statistical tables referred to in the preceding footnote set forth, in terms of *car-foot miles*, not only the amount of authorized and used space to be paid for at the rates fixed, but also the amount of unauthorized or dead space in each class of service necessarily operated in connection therewith and to be taken into account in fixing the rate for each class. The proportion of such car-foot miles of such complementary space necessarily varies among the classes of service and accounts primarily for the fact that the rate for a 30 foot car is in excess of one-half of that provided for a full 60 foot car. As to each class of service, however, the necessary theory of the statistical study made and of the rates based thereon is that the cost and value of each car-foot mile of service in a car, or space unit of a given size, is the same, irrespective of the nature or extent of its use, whether completely filled or only partially so, and whether devoted to transportation or distribution.

petition alleges that the distributing space in a railway post office car is physically separate from the space in such car devoted to transportation of the mails, is susceptible of actual measurement and that none of such space was required or necessary for the transportation of the mails but was furnished solely for the purpose of permitting the department to utilize the time in transit for making distribution (Petition, Rec. pp. 9 & 10). It is therefore plain that, of the total compensation received for the use of each railway post office car operating over appellant's land grant routes, the amount thereof accruing from the furnishing of distributing facilities is that proportion of the total compensation for such car at the rates fixed, which the distributing space is of the total space in such cars multiplied by the distance hauled. The petition states as to each of the several classes of railway post office cars operated over its land grant routes the total miles of service performed, and the proportion thereof represented by distributing space (Petition, Rec. p. 9). The amount sued for represents the difference between the full proportion of the pay accruing on said cars attributable to distributing space thus mathematically ascertained and 80 per cent. already received (Petition, Rec. pp. 13 & 14).

The claim as presented thus comports with the scheme of pay established and is consistent with the statute, its purposes, and its orderly administration.

Appellant's claim likewise conforms to the decision of this Court in *Southern Pacific Company v. United States*, 48 Ct. Cls. 227, 237 U. S. 202. In that case the carrier transported government property and troops between San Francisco and Portland, Oregon, via Roseville, California. Its line between Roseville and Portland was impressed with a land grant obligation to perform such service free. The rates named in its published tariffs for passenger and freight transportation between San Francisco and Portland were stated as through rates, covering the entire service and were less than the sums of the local rates to and

from Roseville. The sole question was how to determine the carrier's compensation for the non-land grant service involved in this through haul for which a single rate was named. The carrier claimed that it should be paid its full local rate between San Francisco and Roseville, presumably representing a fair charge for such service, and that the value of the land grant service between Roseville and Portland was represented by the difference between the through rate and such local. The government contended and both this Court and the Court of Claims held that, since a single rate was named for the entire service, the compensation attributable to the land grant and non-land grant services, respectively, should be determined on a mileage basis; and that for the non-land grant service between San Francisco and Roseville the carrier was entitled only to that proportion of the rate, covering both land grant and non-land grant mileage, which the latter was of both combined. In that case, as in this, the service performed by the carrier was in part subject to a land grant obligation and in part not, but a single rate was named for both combined. Under these circumstances the rate was divided in the proportion in which the volume of physical service subject to the land grant obligation bore to the total physical service performed. In that case the proportion ascribed to land grant service was the proportion which the miles of freight, or passenger, transportation over the land grant mileage was of the total miles of freight, or passenger, transportation performed and covered by the single rate fixed. In this case it is the proportion which the car foot miles of distributing space was of the total car foot miles of railway post office car space of which they form a part.

For a full statement of the facts in the foregoing case the opinion of the Court of Claims (48 Ct. Cls. 227) should be consulted. By reference thereto as well as to 8 Comp. Dec. 598 (607) cited therein, it appears that the practice

thus sustained had been of long standing, and had been approved in numerous prior published decisions of the Comptroller of the Treasury. There was thus in effect, at the time of the passage of the act of 1916, a recognized rule of long standing under which a freight or passenger rate, covering both land and non-land grant services was divided on the very simple, natural and equitable basis of the relative physical service performed, which rule had received judicial sanction in the foregoing case, affirmed by this Court more than a year before the act was passed. There is no difference in principle between division of a through rate covering service over land grant and non-grant mileage, and the division of a rate covering land grant and non-land grant services in the same car on the basis of the relative physical service performed. Indeed, it is well known that cost of freight or passenger transportation per mile over one part of a through haul may greatly exceed that over another. Manifestly, however, the cost of transporting a foot of transportation space and a foot of distribution space in a railway post office car over the same mileage in the same car is the same.

A railroad company by commingling non-land grant and land grant services in a single rate cannot defeat the rights of the Government under land grant contracts. Neither may the Government by commingling non-land grant and land grant services in a rate fixed by it deprive a railroad company of reasonable compensation for the non-land grant service. It would be quite as consistent for the Government to contend that, because the Interstate Commerce Commission fixes a through freight rate between points involving both land grant and non-land grant mileage without dividing the same as between the two, a railroad company, required by law to accept 50 per cent. of commercial freight rates for land grant service, is entitled to but 50 per cent. of the entire through rate, thus fixed to cover both land grant and non-land grant

service, as to say that, because it has fixed a single rate to cover both land grant and non-land grant services in a railway post office car, the extent of each of which is to be determined exclusively by the Postmaster General, the Railway Company may receive but 80 per centum of the single rate thus named. Since the fixing of these rates was in the hands of the Government, if they are not susceptible of division it would seem that the carrier would be entitled to 100 per cent. of the single rate thus named. Otherwise the Government would be in the position of taking advantage of its own wrong. Both rates and service are, however, susceptible of accurate division on the basis of the relative amounts of space furnished and hauled. The claim presented is supported by every consideration of common sense, by the very nature of the scheme of space rates established in the Act, and continued by the Commission and by the authority of the foregoing case.

Whatever interpretation be placed upon that part of the Act of 1916 fixing land grant rates the carrier is clearly entitled to the compensation claimed, if it be held that the furnishing of distributing space was not within its land grant obligation. First, if it be held that the land grant rate provisions of the Act of 1916 applied only to compensation for transportation, then necessarily the compensation accruing to appellant over its land grant routes under the space scheme of rates in force is to be measured and determined in the manner above described.

Second, if it be held that Congress intended by the Act of 1916 to apply the 80 per cent. basis to distributing space but was without power to do so, then so much of the Act is void, and the rest of the Act remains in full force and effect. Among the provisions thus remaining is the one that "fair and reasonable compensation" shall be made for all the service prescribed in the act; and the appellant is thus entitled, under the act, to that proportion of the reasonable compensation accruing under the space system of pay which is earned through the furnishing of

distributing space, to be ascertained in the manner described.

Third, if it be held that by reason of a void and ineffectual attempt upon the part of Congress to apply the 80 per cent. basis to compensation to be received for the furnishing of distributing space, Congress made no provision for just and reasonable compensation therefor, then appellant is entitled to recover in the Court of Claims on implied contract the reasonable value of services involuntarily performed under the requirement of an act of Congress and at the instance of a public officer authorized to compel such performance. (*United States v. Great Falls Mfg. Co.*, 112 U. S. 645; *United States v. Lynah*, 188 U. S. 445; *Hollister v. Benedict Mfg. Co.*, 113 U. S. 59; *United States v. Berdan Fire Arms Co.*, 156 U. S. 552; *Freund v. U. S.*, *supra*). That such services were reasonably worth the amount claimed, determined in the manner stated, is specifically alleged in the petition (Petition, Rec. p. 14).

It is respectfully submitted that the judgment of the Court of Claims dismissing appellant's petition should be reversed.

FREDERICK H. WOOD,
Attorney for Appellant.

THOMAS W. GREGORY,
of Counsel.

APPENDIX.

ACT OF JULY 28, 1916, 39 Stat. at L. 412, 425-431.

SEC. 5. 1. That the Postmaster General is authorized and directed to readjust the compensation to be paid to railroad companies from and after the thirtieth day of June, nineteen hundred and sixteen, or as soon thereafter as may be practicable, for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and at the rates hereinafter provided.

2. The Postmaster General may state railroad mail routes and authorize mail service thereon of the following four classes, namely: Full railway post-office car service, apartment railway post-office car service, storage-car service, and closed-pouch service.

3. Full railway post-office car mail service shall be service by cars forty feet or more in length, constructed, fitted up, and maintained for the distribution of mails on trains. The authorization of full railway post-office cars shall be for standard-size cars sixty feet in length, inside measurement, except as hereinafter provided.

4. Apartment railway post-office car mail service, shall be service by apartments less than forty feet in length in cars constructed, fitted up, and maintained for the distribution of mails on trains. Two standard sizes of apartment railway post-office cars may be authorized and paid for, namely, apartments fifteen feet and thirty feet in length, inside measurement, except as hereinafter provided.

5. Storage-car mail service shall be service by cars used for the storage and carriage of mails in transit other than by full and apartment railway post-office cars. The authorizations for storage cars shall be for cars sixty feet in length, inside measurement, except as hereinafter provided: *Provided*, That storage space in units of three feet, seven feet, fifteen feet, and thirty feet, both sides of car, may be authorized in baggage cars at not exceeding pro rata of the rates hereinafter named for sixty-foot storage cars.

6. Service by full and apartment railway post-office cars and storage cars shall include the carriage thereon of all mail matter, equipment, and supplies for the mail service and the employees of the Postal Service or Post Office Department, as shall be directed by the Postmaster General to be so carried.

7. Closed-pouch mail service shall be the transportation and handling by railroad employees of mails on trains on which full or apartment railway post-office cars are not authorized, except as hereinbefore provided. The authorization for closed-pouch service shall be for units of seven feet and three feet in length, both sides of car.

8. The rates of payment for the services authorized in accordance with this section shall be as follows, namely:

For full railway post-office car mail service at not exceeding 21 cents for each mile of service by a sixty-foot car.

In addition thereto he may allow not exceeding \$4.25 as a combined initial and terminal rate for each one-way trip of a sixty-foot car.

For apartment railway post-office car mail service at not exceeding 11 cents for each mile of service by a thirty-foot apartment car and 6 cents for each mile of service by a fifteen-foot apartment car.

In addition thereto he may allow not exceeding \$2.75 as a combined initial and terminal rate for each one-way trip of a thirty-foot apartment car and \$2 as a combined initial and terminal rate for each one-way trip of a fifteen-foot apartment car.

For storage-car mail service at not exceeding 21 cents for each mile of service by a sixty-foot car.

In addition thereto he may allow not exceeding \$4.25 as a combined initial and terminal rate for each one-way trip of a sixty-foot car.

Where authorizations are made for cars of the standard lengths of sixty, thirty, and fifteen feet, as provided by this section, and the railroad company is unable to furnish such cars of the length authorized, but furnishes cars of lesser length than those authorized, but which are determined by the department to be sufficient for the service, the Postmaster General may accept the same and pay only for the actual space furnished and used, the compensation to be not exceeding pro rata of that provided by this section for the standard length so authorized: *Provided*, That the Postmaster General may accept cars and apartments of greater length than those of the standard requested, but no compensation shall be allowed for such excess lengths.

For closed-pouch service, at not exceeding 1½ cents for each mile of service when a three-foot unit is authorized, and 3 cents for each mile of service when a seven-foot unit is authorized.

In addition thereto he may allow not exceeding 25 cents as the combined initial and terminal rate for each one-way trip of a three-foot unit of service and 50 cents as a combined initial and terminal rate for each one-way trip of a seven-foot unit of service.

9. Railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress, on the condition that the mails should be transported over their roads at such price as Congress should by law direct, shall receive only eighty per centum of the compensation otherwise authorized by this section.

10. The initial and terminal rates provided for herein shall cover expenses of loading and unloading mails, switching, lighting, heating, cleaning mail cars, and all other expenses incidental to station service and required by the Postmaster General in connection with the mails that are not included in the car-mile rate. The allowance for full railway post-office cars, apartment railway post-office cars, and storage cars may be varied in accordance with the approximate difference in their respective cost of construction and maintenance.

11. In computing the car miles of the full railway post-office cars and apartment railway post-office cars, the maximum space authorized in

either direction of a round-trip car run shall be regarded as the space to be computed in both directions, unless otherwise mutually agreed upon.

12. In computing the car miles of storage cars, the maximum space authorized in either direction of a round-trip car run shall be regarded as the space to be computed in both directions, unless the car be used by the company in the return movement, or otherwise mutually agreed upon.

13. New service and additional service may be authorized at not exceeding the rates herein provided, and service may be reduced or discontinued with pro rata reductions in pay, as the needs of the Postal Service may require: *Provided*, That no additional pay shall be allowed for additional service unless specifically authorized by the Postmaster General.

14. The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates than those herein specified, and make report to Congress of all cases where such special contracts are made and the terms and reasons therefor.

15. All cars or parts of cars used for the Railway Mail Service shall be of such construction, style, length, and character, and furnished in such manner as shall be required by the Postmaster General, and shall be constructed, fitted up, maintained, heated, lighted, and cleaned by and at the expense of the railroad companies. No pay shall be allowed for service by any railway post-office car which is not sound in material and construction and which is not equipped with sanitary drinking-water containers and toilet facilities, nor unless such car is regularly and thoroughly cleaned. No pay shall be allowed for service by any wooden full railway post-office car unless constructed substantially in accordance with the most approved plans and specifications of the Post Office Department for such type of cars, nor for service by any wooden full railway post-office car run in any train between adjoining steel cars, or between the engine and a steel car adjoining. After the first of July, nineteen hundred and seventeen, the Postmaster General shall not approve or allow to be used, or pay for service by, any full railway post-office car not constructed of steel or steel underframe or equally indestructible material; and all full railway post-office cars accepted for this service and contracted for by the railroad companies hereafter shall be constructed of steel. Until July first, nineteen hundred and seventeen, in cases of emergency and in cases where the necessities of the service require it, the Postmaster General may provide for service by full railway post-office cars of other than steel or steel underframe construction, and fix therefor such rate of compensation within the maximum herein provided as shall give consideration to the inferior character of construction, and the railroad companies shall furnish service by such cars at such rates so fixed.

16. Service over property owned or controlled by another company or a terminal company shall be considered service of the railroad company

using such property and not that of the other or terminal company: *Provided*, That service over land-grant roads shall be paid for as herein provided.

17. Railroad companies carrying the mails shall furnish all necessary facilities for caring for and handling them while in their custody. They shall furnish all cars or parts of cars used in the transportation and distribution of the mails, except as herein otherwise provided, and place them in stations before the departure of trains at such times and when required to do so. They shall provide station space and rooms for handling, storing, and transfer of mails in transit, including the separation thereof, by packages for connecting lines, and such distribution of registered mail in transit as may be necessary, and for offices for the employees of the Railway Mail Service engaged in such station work when required by the Postmaster General, in which mail from station boxes may be distributed if it does not require additional space.

18. If any railroad company carrying the mails shall fail or refuse to provide cars or apartments in cars for distribution purposes when required by the Postmaster General, or shall fail or refuse to construct, fit up, maintain, heat, light, and clean such cars and provide such appliances for use in case of accident as may be required by the Postmaster General, it shall be fined such reasonable sum as may, in the discretion of the Postmaster General, be deemed proper.

19. The Postmaster General shall in all cases decide upon what trains and in what manner the mails shall be conveyed. Every railroad company carrying the mails and shall carry on any train it operates, and with due speed, all mailable matter, equipment, and supplies directed to be carried thereon. If any such railroad company shall fail or refuse to transport the mails, equipment, and supplies when required by the Postmaster General on any train or trains it operates, such company shall be fined such reasonable amount as may, in the discretion of the Postmaster General, be deemed proper.

20. The Postmaster General may make deductions from the pay of railroad companies carrying the mails under the provisions of this section for reduction in service or infrequency of service where, in his judgment, the importance of the facilities withdrawn or reduced requires it, and impose fines upon them for delinquencies. He may deduct the price of the value of the service in cases where it is not performed, and not exceeding three times its value if the failure be occasioned by the fault of the railroad company.

21. The provisions of this section shall apply to service operated by railroad companies partly by railroad and partly by steamboats.

22. The provisions of this section respecting the rates of compensation shall not apply to mails conveyed under special arrangement in freight trains, for which rates not exceeding the usual and just freight rates may be paid, in accordance with the classifications and tariffs approved by the Interstate Commerce Commission.

23. Railroad companies carrying the mails shall submit, under oath, when and in such form as may be required by the Postmaster General, evidence as to the performance of service.

24. The Postmaster General shall, from time to time, request information from the Interstate Commerce Commission as to the revenue received by railroad companies from express companies for services rendered in the transportation of express matter, and may, in his discretion, arrange for the transportation of mail matter other than of the first class at rates not exceeding those so ascertained and reported to him, and it shall be the duty of the railroad companies to carry such mail matter at such rates fixed by the Postmaster General.

25. The Postmaster General is authorized, in his discretion, to petition the Interstate Commerce Commission for the determination of a postal carload or less-than-carload rate for transportation of mail matter of the fourth class and periodicals, and may provide for and authorize such transportation, when practicable, at such rates, and it shall be the duty of the railroad companies to provide and perform such service at such rates and on the conditions prescribed by the Postmaster General.

26. The Postmaster General may, in his discretion, distinguish between the several classes of mail matter and provide for less frequent dispatches of mail matter of the third and fourth classes and periodicals when lower rates for transportation or other economies may be secured thereby without material detriment to the service.

27. The Postmaster General is authorized to return to the mails, when practicable for the utilization of car space paid for and not needed for the mails, postal cards, stamped envelopes, newspaper wrappers, empty mail bags, furniture, equipment, and other supplies for the Postal Service.

28. The Postmaster General, in cases of emergency between October first and April first of any year, may hereafter return to the mails empty mail bags and other equipment theretofore withdrawn therefrom as required by law, and, where such return requires additional authorization of car space under the provisions of this section, to pay for the transportation thereof as provided for herein out of the appropriation for inland transportation by railroad routes.

29. The Postmaster General may have the weights of mail taken on railroad mail routes, and computations of the average loads of the several classes of cars and other computations for statistical and administrative purposes made at such times as he may elect, and pay the expense thereof out of the appropriation for inland transportation by railroad routes.

30. Pending the decision of the Interstate Commerce Commission as hereinafter provided for, the existing method and rates of railway mail pay shall remain in effect, except on such routes or systems as the Postmaster General shall select, and to the extent he may find it practicable and necessary to place upon the space system of pay in the manner and at the rates provided in this section, with the consent and approval of the Interstate Commerce Commission, in order to properly present to the Interstate Commerce Commission the matters hereinafter referred thereto: *Provided*, That if the final decisions of the Interstate Commerce Commission shall be adverse to the space system, and if the

rates established by it under whatever method or system is adopted shall be greater or less than the rates under this section, the Postmaster General shall readjust the compensation of the carriers on such selected routes and systems in accordance therewith, from the dates on which the rates named in this section became effective.

31. All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.

32. The Interstate Commerce Commission is hereby empowered and directed as soon as practicable to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until changed by the commission after due notice and hearing.

33. In fixing and determining the fair and reasonable rates for such service the commission shall consider the relation existing between the railroads as public service corporations and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroads.

34. The procedure for the ascertainment of said rates and compensation shall be as follows:

Within three months from and after the approval of this act, or as soon thereafter as may be practicable, the Postmaster General shall file with the commission a statement showing the transportation required of all railway common carriers, including the number, equipment, size, and construction of the cars necessary for the transaction of the business; the character and speed of the trains which are to carry the various kinds of mail; the service, both terminal and en route, which the carriers are to render; and all other information which may be material to the inquiry, but such other information may be filed at any time in the discretion of the commission.

The Postmaster General is authorized to employ such clerical and other assistance as shall be necessary to carry out the provisions of this section, and to rent quarters in Washington, District of Columbia, if necessary, for the clerical force engaged thereon, and to pay for the same out of the appropriation for inland transportation by railroad routes. The Postmaster General shall file with the commission a comprehensive plan for the transportation of the mails on said railways and shall embody therein what he believes to be the reasonable rate or compensation the said railway carriers should receive.

Thereupon the commission shall give notice of not less than thirty days to each carrier so required to transport mail and render service, and upon a day to be fixed by the commission, not later than thirty days after the expiration of the notice herein required, each of said carriers shall make answer and the commission shall proceed with the hearing as now provided by law for other hearings between carriers and shippers or associations.

All the provisions of the law for taking testimony, securing evidence, penalties, and procedure are hereby made applicable.

For the purpose of determining and fixing rates or compensation hereunder the Commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification.

35. Pending such hearings, and the final determination of the question, if the Interstate Commerce Commission shall determine that it is necessary or advisable, in order to carry out the provisions of this section, to have additional and more frequent weighing of the mails for statistical purposes, the Postmaster General, upon request of the commission, shall provide therefor in the manner now prescribed by law, but such weighing need not be for more than thirty days.

36. At the conclusion of the hearing the Commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the service connected therewith and during the continuance of the order the Postmaster General shall pay the carrier from the appropriation herein made such rate or compensation.

37. Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a re-examination, and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein.

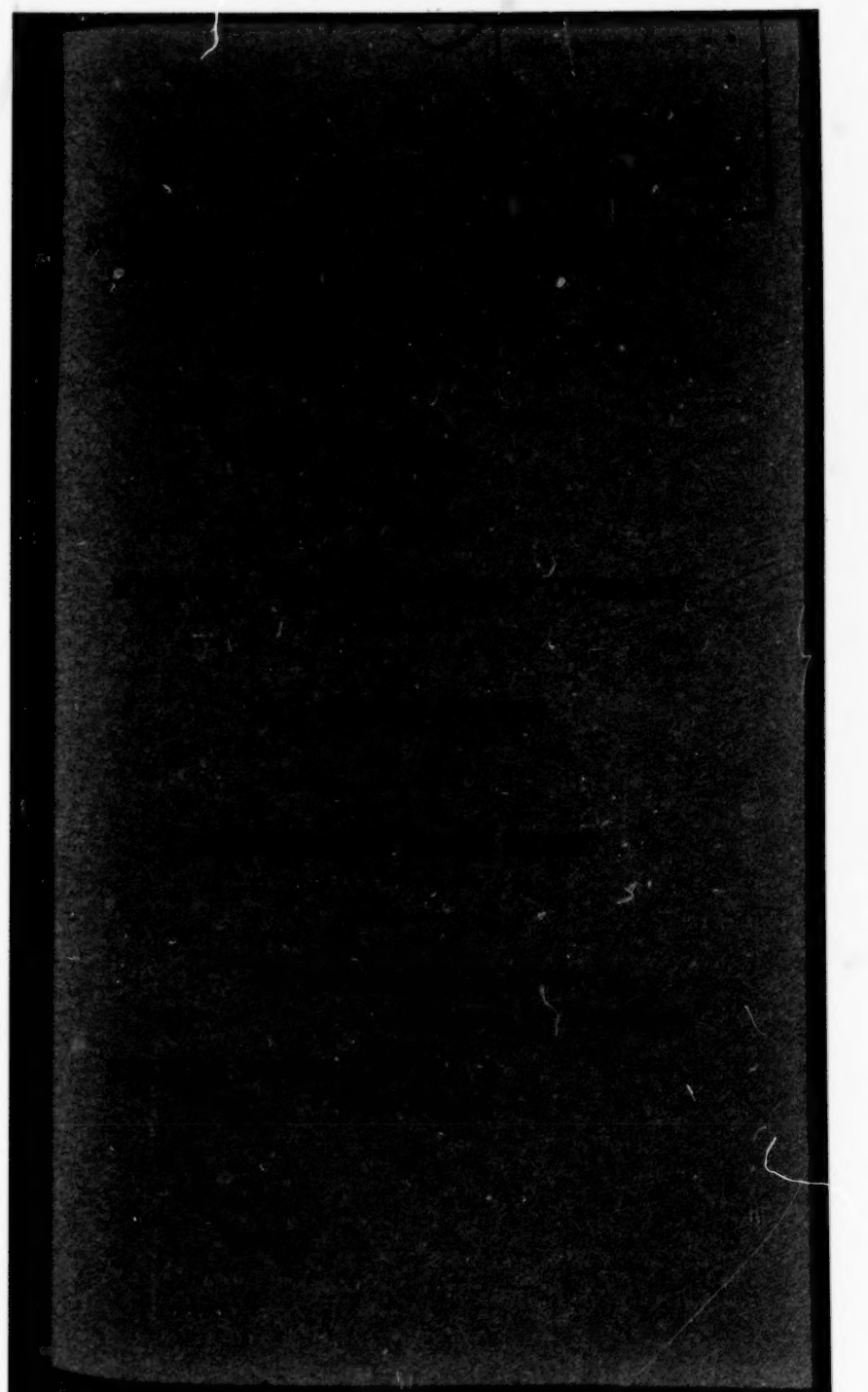
38. For the purposes of this section the Interstate Commerce Commission is hereby vested with all the powers which it is now authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers.

39. The Interstate Commerce Commission shall allow to railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress on condition that the mails should be transported over their roads at such price as Congress should by law direct only eighty per centum of the compensation paid other railroads for transporting the mails and all service by the railroads in connection therewith.

40. The existing law for the determination of mail pay, except as herein modified, shall continue in effect until the Interstate Commerce Commission under the provisions hereof fixes the fair, reasonable rate or compensation for such transportation and service.

41. That the appropriations for inland transportation by railroad routes and for railway post-office car service for the fiscal year ending June thirtieth, nineteen hundred and seventeen, are hereby made available for the purposes of this section.

42. That it shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General so to do, and for such offense shall be fined \$1,000. Each day of refusal shall constitute a separate offense.



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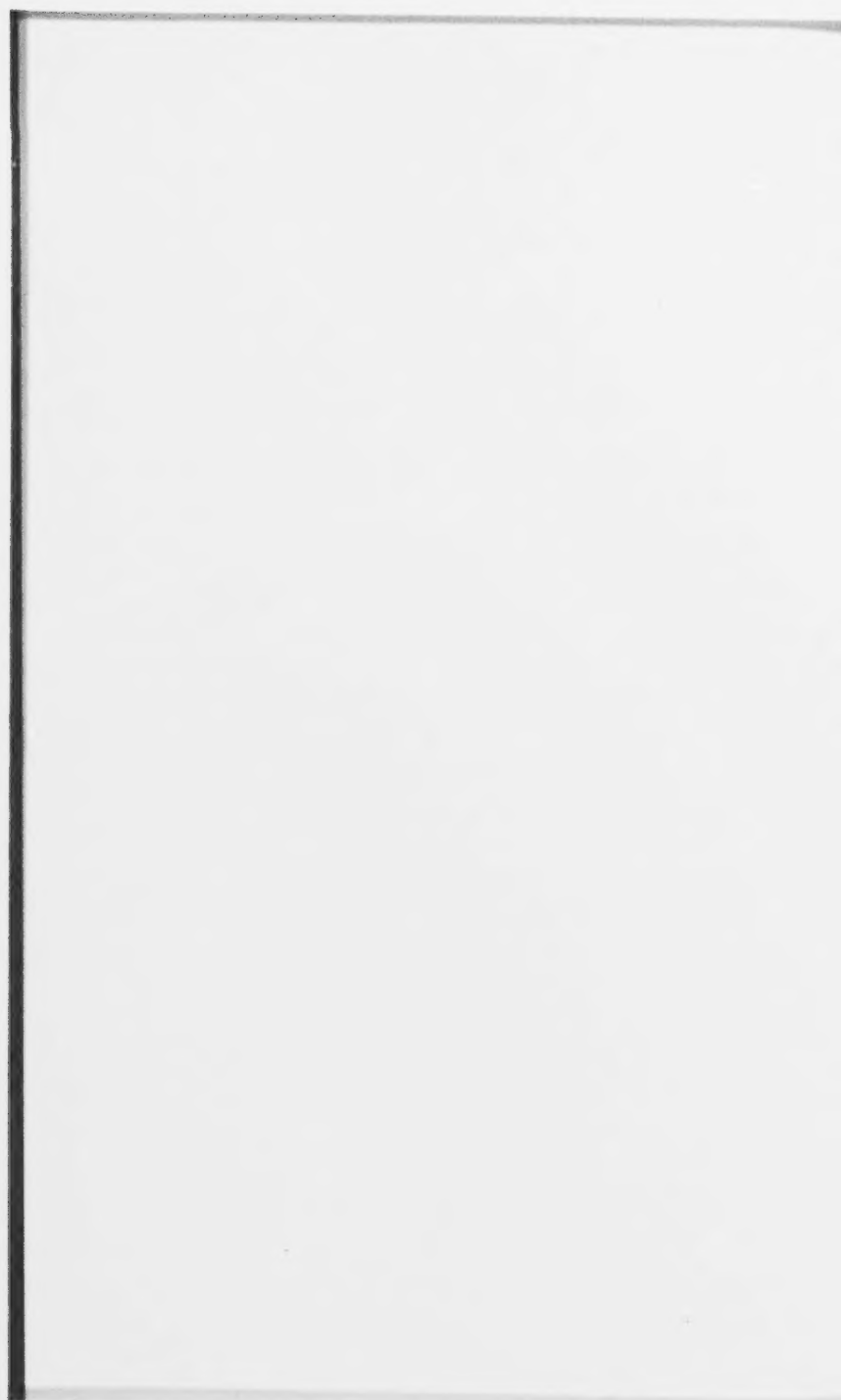
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 280.

MISSOURI PACIFIC RAILROAD COMPANY,
APPELLANT,

vs.

THE UNITED STATES.

APPELLANT'S REPLY BRIEF.

Before taking up the Government's brief it is desired to direct attention again to the contention, made in our opening brief, that the provision made in the Act of 1916 for payment to land-aided roads was a mere re-enactment of a similar provision in the Act of 1876, which had been construed for 40 years as inapplicable to payments made for the furnishing of distributing facilities, and that the Act of 1916 should be similarly construed (Section VII, Appellant's Opening Brief, pp. 40-45), a point nowhere discussed in the Government's brief. If so construed, none of the questions raised in the Government's brief are material.

It is true that, literally construed, the 80 per cent provision in the Act of 1916 applies to all services. This, however, was equally true of the Act of 1876. It would be out of place to repeat here the arguments advanced in our opening brief in support of this contention. It is, however, appropriate to direct the Court's attention to the fact that if this contention be sound, then all other questions vanish, since the 80 per cent basis has been undeniably applied to all services performed by the appellant, including the furnishing of distributing space, as distinguished from its prior limitation to payments for transportation only under the earlier and similar statute.

I.

The Petition States a Cause of Action Justiciable in the Court of Claims.

The contention that "this action is in reality an attempt to set aside an order of the Interstate Commerce Commission," and hence is not justiciable in the Court of Claims, is wholly without merit.

The only power delegated to the Commission was to "fix and determine from time to time fair and reasonable rates" for the several classes of service required by the act to be performed, "prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate of compensation." The reasonableness of the rates thus fixed is not challenged in this suit. With reasonable rates thus established by the Commission, the act itself fixes the basis of pay for

land-grant routes. The Commission was not authorized to fix rates separately for land-grant services nor given any discretion as to the basis of payment therefor. Nor did it attempt to do so. It is true that it interpreted the 80 per cent basis as applicable to all services covered by the act. The determination of this question involves, first, a construction of the Act of 1916, and, second, a determination of appellant's land-grant obligations under the Acts of 1852 and 1853. Neither of these questions is within the administrative discretion of the Commission or call for the exercise of its expert judgment. Its interpretation is binding neither upon the appellant nor the Government. Whether this action is one to set aside an order of the Commission may be tested by considering what the effect of a contrary ruling upon the part of the Commission would have been. Manifestly, if the Commission had held the appellant to be entitled to full compensation for the furnishing of distributing facilities, it would have been open to the Post Office Department to have declined to pay such full compensation upon the ground that under the statute the appellant was entitled to but 80 per cent thereof. In order to have asserted this contention, it would not have been necessary for the United States to have brought an action in the district court to set the order of the Commission aside. It could have declined payment of more than 80 per cent of the compensation accruing for such services, in which event the appellant's remedy would have been to sue in the Court of Claims, whose duty it would have been to have interpreted the Act of 1916 and to

have construed the appellant's land grant. Neither such a suit nor this suit constitutes any attack upon the order of the Commission or upon any ruling within its exclusive and peculiar jurisdiction. The 80 per cent basis derives its sanction from the act itself and not from the Commission, and its proper application, and all questions of law pertinent thereto, are directly justiciable in court, however the question arises.

Since this action involves no attack upon the reasonableness of the rates established by the Commission for general application, all that is said in the Government's brief in relation to the painstaking care which the Commission devoted to the determination of the difficult and complicated questions involved in the determination of reasonable rates or to the "symmetry" of the rates established, is without bearing upon the issue presented.

This suit does not seek any change in the rates fixed by the Commission. It seeks to recover compensation accruing thereunder as reasonable compensation for services, performed under compulsion of an act of Congress, alleged to be outside its land-grant obligations.

Neither *Klebe v. U. S.*, 263 U. S. 188, nor *U. S. v. North American Company*, 253 U. S. 330, are pertinent. In the first case, the court held that, since plaintiff had acquiesced in the terms of an express contract, he could not recover on an implied contract for the reasonable value of the property taken. The second case related to compensation for the use of property forcibly taken possession of by an army officer without any authority so to do. The case turned primarily

upon the statute of limitations. The court held that since the army officer had no authority to take possession of the property, the taking did not occur until the occupation was ratified and affirmed by officers duly authorized, but held squarely that as of the time of such ratification the plaintiff was entitled to recover the reasonable value of the property under implied contract.

The claimant in this case has furnished services under compulsion of an act of Congress at the instance of an officer authorized to compel performance. The statute itself provides for the making of reasonable compensation. The appellant seeks to recover the same on the basis of the rates fixed under the statute as reasonable. Its claim is clearly one which is founded both upon a statute of the United States and upon implied contract and over which the Court of Claims had jurisdiction under Section 145 of the Judicial Code. In asserting that the appellant's rights under the statute have been erroneously construed, the appellant is not claiming in violation of the statute but under it. Its contention may be wrong, but the jurisdiction of the Court of Claims to pass upon its contention is clear.

II.

The Arguments Relied Upon in the Government's Brief to Bring the Operation of Railway Post Office Cars Within the Appellant's Land-grant Obligation are Untenable.

The Government does not contend that, judged by the words employed in the grant or the nature of the

services themselves, the furnishing of railway post-office cars is within the land-grant obligation to "transport" the mails. It relies solely upon certain historical facts, which, however, do not support its contentions.

The question is whether the furnishing of railway post-office cars for distribution is within the land-grant obligation. The date when such cars first came into use is placed in the Government brief as 1862 (Government Brief, p. 21), or ten years after the making of appellant's land grant, thus corroborating the allegation in the petition that the use of such cars was unknown at the time. It is, however, contended that in some way train distribution was practiced prior to the installation of railway post-office car service. Since the petition alleges that train distribution was unknown at the time of appellant's land grant, we might rest upon this allegation, as the case is here on appeal from judgment sustaining a demurrer. In addition, the public documents, which must be largely relied on in this connection, support the allegation. The contrary contention of the Government is based solely on certain postal rules and regulations antedating the grants and relating to so-called "route agents." It does not clearly appear from such regulations what were the duties of these route agents and presumably no one now living knows. However, the report of the Postmaster General for 1864 contains the following:

"For many years the regulations of this Department have required that every post-office should mail letters direct to every other office

not on the route to *any distributing office*, and that all other letters should be mailed to *the first distributing office* on the route to their destination, involving considerable expense and delays in the transmission of the mails. This subject has been frequently referred to in the reports of this Department. Elaborate distribution schemes have been proposed to improve the existing system, which is still considered defective. * * * *The ordinary distributing post-offices not meeting the necessities of the service, experiments have been commenced with railway or travelling post-offices.*" (Report of Postmaster General, 1864, p. 14—Italics ours.)

After describing these experiments the report goes on to speak of difficulties which will be experienced in making the proposed scheme of distribution effective and of the additional expense which will be involved "until the necessary classification (of offices) is completed and the *railway distribution* organized." This report was made in 1864, over ten years after appellant's land grants.

As stated in the Government's brief, the railway mail service has been the subject of successive congressional investigations, including one made by a congressional joint commission in 1901. Certain findings of this commission are quoted on page 39 of the latest of these investigations, made by the Bourne Commission in 1914 (*Railway Mail Pay, Preliminary Report and Hearings of the Joint Committee on Postage of Second-Class Mail Matter and Compensation for the Transportation of the Mail, 1914*), were set forth on

page 20 of appellant's opening brief and are as follows:

“Railway Post-office Cars.

“Until a comparatively short time prior to 1873 the distribution of the mails in transit was unknown. Prior to the late sixties the railroads simply transported the mails, which were delivered at the post offices and there distributed. Accordingly, ‘weight’ as the basis of compensation, was at the time of its adoption, and long thereafter, entirely adequate.

“For a few years, however, prior to 1873 the distribution of the mails in transit had been practised to a sufficient extent to satisfy the Post Office Department and Congress that it was a desirable innovation and a branch of the Postal service that should be very much enlarged; but it was recognized that if the railroads were not only to transport the mail itself but also to supply, equip, and haul post offices for the distribution of the mails, the compensation upon weight basis that had obtained up to that time was not entirely adequate and just, and therefore the law of 1873, as already indicated, contained a provision allowing additional compensation for railway post-office cars. At first these cars were mostly not exceeding 40 or 45 feet in length and of light construction similar to baggage and express cars.” (Italics ours.)

Whatever the duties of route agents may have been prior to the use of railway post-office cars, it is clear from these two reports that the use of railway post-office cars and of train distribution, as the term is now understood and as it was used in the Act of 1916,

were unknown at the time of the appellant's land grants in 1852 and 1853. No doubt mails on certain trains were accompanied by agents or caretakers similar to express messengers, who doubtless performed certain limited functions in the handling of the mails on the train. Even without the authority of these reports it should be self-evident that, without the use of the specially equipped post-office cars now in service, which did not come into being until 1862, and the furnishing of which was for the first time made obligatory upon the railroads in 1916, train distribution, as the term is now understood, would have been impossible.

Even were it otherwise, it does not follow that the furnishing of railway post-office cars is within the appellant's land-grant obligation. This would depend, first, upon the terms employed in the grant, interpreted in the light of their ordinary and usual meaning (*Lake Superior & M. R. R. Co. vs. United States*, 93 U. S. 442), and, second, if the words were ambiguous, upon the interpretation placed thereon by the parties at the time.

Under either test the service in question is outside the terms of the grant. The historical facts recited in the Government's brief and from which the contemporaneous interpretation of the parties is to be determined are all against the Government's contention.

By the Government's own admission Congress did not exercise its power to fix the price for the transportation of the mails by land-aided roads until the pas-

sage of the Act of July 12, 1876 (Government Brief, p. 26). Until it exercised this power there was no occasion for either the Government or the carriers to make any distinction as between land-grant and non-land-grant services. When this act was passed all carriers were being paid at weight rates for the transportation of the mails, with additional allowances for the furnishing of railway post-office cars 40 feet in length or over and without distinction as to either service between land-aided and non-land-aided roads. These car allowances were those authorized in the Act of 1873 in recognition of the fact, as stated in the foregoing quotation from the Report of the Joint Commission in 1901, that "if the railroads were not only to transport the mails, but also to supply, equip, and haul post offices for the distribution of the mails, the compensation upon the weight basis that had obtained up to that time was not entirely adequate and just." This itself is a clear recognition that the service was regarded as a separate and additional service. The Act of 1876 provided that land-grant roads should receive but 80 per cent of standard pay. Literally interpreted, it called for the application of the 80 per cent basis to all services performed and for which compensation authorized was to be paid. This is not challenged in the Government brief and, considering the language employed in the act, is not susceptible of challenge. The 80 per cent basis was, nevertheless, limited in its application by the Post Office Department to the weight rates paid for the transportation of the mails. Land-aided railroads, as well as all

others, received 100 per cent of the authorized car allowances and continued so to do down to the establishment of the space basis of pay in 1916. That such was the situation during all of this period is conceded by the Government. From the very inception of land-grant rates the Government thus recognized the furnishing of railway post-office cars as a separate and distinct service not within the land-grant contract and continued so to do for forty years. Otherwise it would have been the duty of the Postmaster General to apply the 80 per cent basis thereto.

The Government seeks to avoid the effect of this contemporaneous construction by pointing out that during the same period distributing facilities were supplied in cars of less than 40 feet in length for which no additional compensation was allowed. This was done both by land-grant and non-land-grant roads. Both could have refused, since mails were then being carried under contract. On the other hand, both could, as they did, waive additional compensation therefor, doubtless for reasons of expediency. To the extent, however, that additional compensation was made for the furnishing of railway post-office cars for use in distribution, it was made to land-grant and non-land-grant carriers alike, at the full rates provided in the act. Although the railroads could and did waive additional compensation for the use of distributing cars less than 40 feet in length, the Postmaster General and other Government officers could not waive or ignore the statutory provision fixing land-grant rates at 80 per cent of those accruing to other carriers. The limita-

tion of the 80 per cent basis during this period to the weight rates for the transportation of the mails cannot, therefore, be explained as a waiver of some assumed right in the Government to apply the same basis to car allowances as compensation for the use of distributing facilities, as is attempted in the Government brief. The payment of full-car allowances to land-grant roads from the inception of land-grant rates to 1916 is consistent only with the theory that the obligation of land-grant carriers to transport the mails at such prices as Congress might fix was interpreted by the administrative officers of the Government as limited to the transportation of the mails and as not including the furnishing of distributing facilities and cannot be otherwise explained.

The historical facts relied on by the Government thus clearly establish a contemporaneous construction of appellant's land-grant obligations of 40 years duration, under which the furnishing of railway post-offices was excluded from such land-grant obligations. If, as erroneously contended by the Government, train distribution was in fact practised at the time of appellant's grant, this contemporaneous construction becomes even more significant.

Even were it otherwise, the appellant is clearly entitled to recover. There can be no pretense that appellant has itself at any time recognized the performance of such service as within its land-grant contract. If all historical considerations, conclusive as they are, be ignored, the words of the grant, the nature of the

service, the terms of the Act of 1916, and all other matters mentioned in our opening brief show, beyond doubt, that the furnishing of distribution space and facilities are not within the land-grant obligations.

III.

The Argument that Because Congress Might have Fixed the Pay for Transportation Space at Less than Eighty Per Cent of Standard Rates, the Appellant, Having Been Paid Eighty Per Cent of Standard Pay for Both Transportation and Distribution Space, has Received Full Compensation for the Latter, is on Its Face Without Merit.

Under the theory set forth in the heading and expounded in Section III of the Government's brief, total pay at full rates is first split as between transportation and distribution space in the relative proportion of each. Full pay for transportation space as thus ascertained is then deducted from the total pay received by the appellant (80 per cent of the entire rate for both services combined) and the remainder is to be deemed to represent pay received for the transportation space, which is subject to land-grant rates. The result is that in a 60-foot standard post-office car the carrier is deemed, under this theory, to have received 16.2 cents per mile for distribution space, or 100 per cent of the pay accruing therefor at standard rates, and 5.4 cents per mile for transportation space (Government Brief, p. 32). The amount thus attributable to transportation space is approximately 46 per cent of

the compensation accruing for such space at standard rates to other carriers. In 30-foot apartment cars, where the distributing space is but $56\frac{2}{3}$ per cent of the total space, the carrier under this theory would receive 54 per cent of standard pay and in a standard 15-foot apartment car, where the distribution space is but $46\frac{2}{3}$ per cent of the total, would receive 62 per cent of standard pay. Under this theory neither the rate nor the percentage of standard pay which a land-grant carrier receives for transportation space is fixed at all, but depends entirely upon the relation of distributing space to transportation space and varies with every change therein. It decreases with every increase in the proportion of distributing space and increases with every decrease thereof. Under this theory the percentage of standard pay which a land-grant carrier is to receive has not been fixed by Congress at all. It has been left indeterminate, to vary with the proportion of distributing space in railway post-office cars as directed to be furnished by the Postmaster General.

That the Government itself does not contend that land-grant rates have been established by Congress on any such indeterminate basis would appear from the following statement on page 33 of its brief:

“* * * If Congress had fixed a flat rate for land-grant railroads for strict transportation at 5.4 cents per mile in full 60-foot cars, and the Interstate Commerce Commission had fixed 16.2 per mile for the rest of the car, the result to the company would have been the same. *Of course we do not claim that the Commerce Commission actually figured the rates in*

this way, but we have just as much right to figure them this way in order to sustain the Commission's action, as the plaintiff has to figure them in some other way in order to defeat it." (Italics ours.)

The whole purpose of this method of figuring is to make it appear that the appellant has already received full compensation for distributing space. In accomplishing this purpose, however, the act is given a construction under which no standard of pay whatever for transportation space was established—a construction little short of absurd when the language of the act is considered, especially when construed in the light of the Act of 1876 and its long-continued interpretation.

The suggestion that it is necessary to resort to this ingenious but fallacious theory in order "to sustain the Commission's action" is, of course, wholly without merit. The Commission did not fix rates for land-grant service and was not authorized to do so. It did not divide the pay for railway post-office car service between distributing space and transportation space, nor was it required to do so. It fixed a single rate for both services as a reasonable rate for all carriers. Whatever the decision in this case, that rate stands. It is, indeed, the basis upon which compensation accruing to appellant under its theory of the case rests. As pointed out in our opening brief, the division of a rate embracing both land-grant and non-land-grant services presents no novel problem. It arises constantly in connection with the division of rates for passenger

and freight service over mileage partly land grant and partly non-land grant. If the furnishing of distributing space is not within the land-grant obligation of the carrier, then it is entitled to full compensation for that part of the entire rate accruing from such service and to 80 per cent of the balance. The rate fixed for the combined services should, as pointed out in subdivision VIII of our opening brief (pages 45-57), be divided upon the basis of the physical service performed as in the case of other rates commingling land-grant and non-land-grant services. This especially since the rates established by the Commission were established on a strictly space-rate basis. For further argument in support of this contention, reference is made to the foregoing subdivision in appellant's opening brief.

It is respectfully submitted that the judgment of the Court of Claims should be reversed.

FREDERICK H. WOOD,
Attorney for Appellant.

THOMAS W. GREGORY,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 280

MISSOURI PACIFIC RAILROAD COMPANY, APPELLANT,

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS OF THE COURT BELOW

There are two opinions in this case. The principal one, filed March 31, 1924, sustaining a demurrer to the original petition, is in the record at pages 17-23, and is reported in 59 C. Cls. 524. The second, in which the court below, in disposing of a demurrer to an amended petition, affirms its previous action, is in the record at page 16 and is reported in 60 C. Cls. 183. The case before the Interstate Commerce Commission, *Railway Mail Pay case*, is reported in 56 I. C. C. 1-120.

JURISDICTION

The final judgment of the court below sustaining a demurrer to and dismissing the amended petition was rendered on January 19th, 1925, and the appeal was allowed February 2d, 1925. Therefore, the jurisdiction of this court is invoked under Section 242 of the Judicial Code, as it was before the Act of February 13th, 1925, c. 229, 43 Stat. 936.

STATEMENT

By the Act of July 28, 1916, c. 261, Sec. 5, 39 Stat. 412, 425, 430 (printed as an appendix hereto), Congress conferred upon the Interstate Commerce Commission power to fix the rates to be paid to railroad companies for carrying the mails and provided (appendix, pp. 35-48):

The Interstate Commerce Commission shall allow the railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress on condition that the mails should be transported over their roads at such price as Congress should by law direct only 80 per centum of the compensation paid other railroads for transporting the mails and all service by the railroads in connection therewith.

The Commission fixed a rate based upon space per mile, and in accordance with the Act allowed the plaintiff 80 per cent of that rate upon "land-

grant portions of its system." The plaintiff sued to recover the sum of \$189,880.50, alleged to be the difference between the amount which it had received for carrying the mails and the sum to which it was entitled. It concedes the power of Congress to authorize the Commerce Commission to fix rates, and also concedes that the basic rate fixed was fair and reasonable. It concedes the power of Congress to fix the pay for land-grant roads for "transporting" the mails, but draws a distinction between what it regards as transportation proper and the service performed in connection with so-called railway post office cars, and denies the power of Congress under the land-grant Acts to fix its pay for the latter service, at a rate lower than for non-land-grant roads. Accordingly it has attempted to separate the space in those cars devoted to "distributing" mail matter from the space devoted to what it calls "transporting" it, and divides the pay received for hauling a car in proportion to the space devoted to the two purposes. The sum sued for represents the 20 per centum deduction from the basic rate for those portions of the "Full Railway Post Office Cars," the "30-foot Mail Apartment Cars," and the "15-foot Mail Apartment Cars" which, according to the calculation, were used for "distribution" and not for "transportation."

THE FACTS

The plaintiff's petition (R. 1-15) sets forth at great length many facts, conclusions, and portions of statutes from which may be deduced the following:

Since June, 1917, upon which date it became the successor to the systems theretofore owned by The Missouri Pacific Railway Company and The St. Louis, Iron Mountain & Southern Railway Company, and excluding the period of Federal control, the appellant has operated its railroad, which includes land-grant lines in Missouri, Arkansas, Colorado, Illinois, Kansas, Louisiana, and Oklahoma. (R. 1.) Under the Acts of June 10, 1852, c. 45, Sec. 6, 10 Stat. 8, 10, and February 9, 1853, c. 59, Sec. 6, 10 Stat. 155, 156, its predecessors received two land grants from the United States in aid of construction. The first of these acts provided (R. 2):

That the United States mail shall at all times be transported on said railroads under the direction of the Post-Office Department, at such price as Congress may by law direct. ✓

The second Act provided:

That the United States mail shall at all times be transported on said road and branches, under the direction of the Post-Office Department, at such price as Congress may by law direct. ✓

Those portions of its system thus aided are within certain numbered mail routes, and the plaintiff and its predecessors have in the operation of its

lines of railway complied with the obligations imposed upon them by the acts of Congress.

In Paragraph III is set forth with much detail the receipt, distribution, and delivery of mail matter generally. It is alleged that the distribution and redistribution of mail was made in post offices for years after the establishment of railroads as post roads and mail carriers; that thereafter the Post Office Department inaugurated a system whereby a portion of the distribution should be made by postal employees in railway cars fitted up with letter cases, tables, racks, and other fixtures similar to the facilities provided and used for like purposes in ordinary post offices, commonly known as "railway post offices"; that such distribution was unknown and no such cars were in use or existence on any railroad in the United States at the time of the making of the petitioner's land grant; that the furnishing of railway post-office cars for distribution greatly increased the space required and the expense incurred by railroad companies beyond that required and incurred in the mere transportation of the mails (R. 3); that train distribution has been recognized and undertaken by the Post Office Department as a function of that Department and as not embraced under any statutory or contractual obligation of the railroads to transport the mails, and that the distributing service has been performed solely by postal employees riding in the cars, from which

cars railway employees are excluded, except to the extent that train crews are required to pass through the cars in the discharge of their duties (R. 3 and and 4).

It is alleged that by the Act of March 3, 1873, Congress provided a scale of rates for compensation for transporting the mails, and also provided for additional allowances for furnishing railway post-office cars; that by the Act of July 12, 1876, it was provided that land-grant roads should receive but 80 per centum of the compensation accruing to other roads under the rates of pay authorized by Congress for such other carriers, which provision of law remained in force until the passage of the Act of July 28, 1916.

It is alleged that after the Act of July 12, 1876, the plaintiff and all other land-grant roads received but 80 per cent of the rates authorized for payment to other railroads according to the scale from time to time fixed by Congress, but that for services in furnishing railway post office cars, until November 1, 1916, they received the same compensation as other railroads for the performance of like service, and that such practice constitutes a contemporaneous construction of the plaintiff's land grant, whereby the furnishing of said cars was treated as a service separate from, and in addition to, the transportation of the mails, and as not embraced within its obligation to transport mails

at such price as might be fixed by Congress. (R. 5.)

It is alleged that prior to the Act of July 28, 1916, the transportation of mails was by means of voluntary contracts between the companies and the Post Office Department, on the basis of weights ascertained according to law, with additional payments for full railway post-office cars; that the Act of July 28, 1916, made it the duty of railway companies to provide the services defined therein, as required by the Postmaster General, and imposed fines and penalties for failure or refusal; that the services so required include both transportation of the mails and the furnishing of full railway post-office cars and apartment railway post-office cars described collectively as "railway post-office cars;" that such cars are constructed according to plans and specifications of the Department which, in addition to space provided for transportation, contain space occupied by "distributing facilities," which are provided in the cars solely for the purpose of opening pouches and distributing their contents by postal employees, according to destination, into appropriate containers for transportation and delivery. (R. 6.)

The petition sets forth several provisions of the Act, including that requiring the railroads to place cars in stations before the departure of trains, as required, and alleges that this purpose is to enable the Post Office Department to perform in the cars

its administrative function and distribution in advance of the transportation. (R. 7.)

It is further alleged that the distribution space in the cars is physically separated from the remaining space therein and is susceptible of actual measurement, and that the Interstate Commerce Commission found that in standard railway post office cars the total linear feet of space is as follows (R. 9) :

Unit	Distribution space		Doorways		Storage space	
	Feet	Inches	Feet	Inches	Feet	Inches
60-foot full railway post-office car.....	36		7	8	16	4
30-foot mail apartment car.....	17	2	2	10		
15-foot mail apartment car.....	7	.75	2	6		

It is then alleged that the distribution of space in railway post office cars furnished by the plaintiff over its land grant routes between June 1, 1917, and June 31, 1917, and between March 1, 1920, and December 31, 1923, was substantially as represented by the foregoing table; that during said period plaintiff performed 3,438,350 miles of service in full railway post office cars over its land grant routes; 2,082,906 miles of service in 30-foot apartment railway post office cars over said routes, and 1,089,158 miles of service in 15-foot railway apartment cars over said routes; that not less than 60 per cent of the space furnished in railway post office cars, not less than $56\frac{2}{3}$ per cent of the space furnished in 30-foot apartment cars, and not less than

46 $\frac{2}{3}$ per cent of space furnished in 15-foot apartment cars consisted of distributing space. (R. 9.)

It is further alleged that neither the distributing facilities nor any part of the distribution space in these cars is necessary for transporting the mail, but is provided solely to enable the Post Office Department to utilize the time in transit for distribution. (R. 10.)

It is further alleged that the Interstate Commerce Commission found that the space basis of pay should be adopted and continued, and fixed as fair and reasonable rates between November 1, 1916, and January 1, 1918, the following (R. 12):

	Cents
For each mile of service by a 60-foot R. P. O. car.....	27
For each mile of service by a 30-foot Apartment car.....	15
For each mile of service by a 15-foot Apartment car.....	10
For each mile of service by a 60-foot Storage car.....	28
For each mile of service by a 30-foot Storage space.....	15
For each mile of service by a 15-foot Storage space.....	8
For each mile of service by a 7-foot Storage space.....	4 $\frac{1}{2}$
For each mile of service by a 3-foot Storage space.....	2 $\frac{1}{2}$
For each mile of service by a 15-foot Closed-Pouch space.....	10
For each mile of service by a 7-foot Closed-Pouch space.....	5
For each mile of service by a 3-foot Closed-Pouch space.....	3

and for services performed after January 1, 1918, rates 25 per cent. in excess of that scale.

It is further alleged that under the land grant acts the duty of the plaintiff is limited to transporting the mails at such rates as may be fixed by Congress, and that it is not bound in addition thereto to furnish facilities for distribution on its trains or cars and to transport the distributing agents of the Post Office Department at such rates as may be fixed by Congress; that for all such ad-

ditional service performed over its land-grant mileage it is lawfully entitled to just and reasonable compensation, the same compensation accruing to it for the performance of like service on that portion of its lines not within its land grant mileage, and that by reason of the premises it is entitled to be paid "pro rata for all distribution space furnished and hauled by it over its Land Grant Mileage" at the scheme and rates of pay established by the Commerce Commission for services performed in furnishing and hauling railway post office cars, for payment of which demand has been made of the Postmaster General; but notwithstanding, all payments made by the Postmaster General have been made at the rate of 80 per centum, the rate fixed by the Commerce Commission for the services so rendered, without distinction as between space provided for transportation and space provided for distribution, by reason whereof the Postmaster General has wrongfully withheld the sum of \$189,880.54. (R. 13, 14.)

CONTENTIONS OF UNITED STATES

(1) The petition does not state a cause of action justiciable in the Court of Claims.

(2) The furnishing of facilities in the so-called railway post-office cars is included in the transportation for which Congress has power to fix the pay under the Land Grant Acts. ✓

(3) No cause of action based upon the failure to receive just compensation is set forth in the petition.

ARGUMENT

I

THE PETITION DOES NOT STATE A CAUSE OF ACTION
JUSTICIABLE IN THE COURT OF CLAIMS

Stripped of all disguise, this action is in reality an attempt to set aside an order of the Interstate Commerce Commission. That Commission, empowered by Congress, has fixed a rate to be paid for carrying the mails. The plaintiff has received and retained pay in accordance with those rates. Until modified by the Commission or set aside by a court of competent jurisdiction, they are the only rates that may lawfully be received or paid. The plaintiff, however, seeks through the Court of Claims to recover pay at a rate other than the rate lawfully established. The Court of Claims is without power to grant the prayer of such a petition.

The Act of 1916 inaugurated a new policy for fixing compensation to the railroads for mail service. As pointed out by the Interstate Commerce Commission, 56 I. C. C., pages 63 and 64, for many years there had been "ceaseless controversy" between the railroads and the Post Office Department over that question. Commissions and committees, in 1878, 1883, 1901, 1911, and 1914 had, after investigation, made reports on the subject of railway mail pay. In 1914 a committee's report was to the effect that the space basis system should be adopted, and that report resulted in the passage of the Act of July 28, 1916.

That Act authorized the Postmaster General to state railroad mail routes and authorized mail service thereon of four classes (39 Stat. pp. 412, 425, appendix pp. 35-48):

(1) Full railway post office car mail service by cars 40 feet or more in length constructed, fitted up, and maintained for the distribution of mails on trains.

(2) Apartment railway post office car mail service, that is, by apartments less than 40 feet in length constructed, fitted up, and maintained for the distribution of mails on trains, and for this service two standard sizes of apartment cars were authorized, namely, apartments 30 feet in length and apartments 15 feet in length.

(3) Storage car mail service by cars used for the storage and carriage of mails in transit other than by full and apartment railway post office cars.

(4) Closed pouch mail service, the transportation and handling by railroad employees of mails on trains on which full or apartment cars were not authorized, this service to be for units of 7 and 3 feet in length.

The present case involves only the two classes of service first mentioned, full post-office cars and 30 and 15 foot apartment cars.

After authorizing the Postmaster General to pay at rates not exceeding those named in the Act pending determination of rates by the Interstate Commerce Commission, the Act left the whole question to that Commission, which was authorized—

* * * to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such **mail matter by railway common carriers** and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until changed by the Commission after due notice and hearing. (Sec. 5, 39 Stat. 412, 429, appendix p. 45.)

Pursuant to the statute, the Commission, after an exhaustive hearing at which the Postmaster General and the railroads were represented, made its report on December 23, 1919 (56 I. C. C. 1). From this report it appears that the Post Office Department and the railroads each submitted a plan; that of the Department a "space basis" system (56 I. C. C. 47), that of the railroads a "weight basis" system, except only so far as railway post office apartment cars and closed pouch service were concerned, the transportation of the cars to be paid for on the basis of a car-mile rate with respect to the linear feet of distributing space in each car (56 I. C. C. 53, 55), and the contention was made by the railroads that the 80 per cent provision for land-grant railroads should not apply to the distributing space in railway post office and apartment cars, "because the service of carrying distributing facilities can not properly be construed as transportation of the mails as defined in the law." The exact

claim now urged, therefore, was urged before the Commission. (56 I. C. C. 77.)

The question was complicated by the necessity of providing for "initial and terminal" compensation, that is, the services performed in receiving and delivering mails at terminals and intermediate post offices and postal stations. Under the statute, pending the determination of the Commerce Commission, the Postmaster General was authorized, in addition to the other rates provided, to allow initial and terminal rates, as for instance, an allowance not exceeding \$4.25 as a combined initial and terminal rate for each one-way trip of a 60-foot car. (39 Stat. 426.)

After considering all phases of the situation, the Commission concluded that the space basis system should be followed, and that the initial and terminal allowances should be canceled and abolished, payment in lieu thereof being included in the rates which it prescribed. (56 I. C. C. 77.)

The claim on behalf of the land-grant railroads was not sustained the Commission saying, 56 I. C. C. 77):

We are not convinced that Congress intended that services in connection with transporting the mails on land-grant railroads, such as furnishing and hauling distributing facilities, should not be subject to the reduction referred to.

The statute said (39 Stat. 430):

The Interstate Commerce Commission shall allow to railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress on condition that the mails should be transported over their roads at such price as Congress should by law direct only 80 per centum of the compensation paid other railroads for transporting the mails and all service by the railroads in connection therewith.

The Commerce Commission, in overruling the contention of the land-grant roads, followed the unmistakable command of the statute.

We have, then, a case where a most complicated and vexatious problem was submitted by Congress for solution to a Commission peculiarly competent to investigate and determine it fairly, and a result which is probably as nearly just as intelligent, painstaking, and laborious thought can produce. Considering all the different elements, and including the initial and terminal compensation, it fixed a flat rate for each mile of service *per car* according to the size of the car in the case of post office, apartment, and storage cars, and for each mile of service *by space* in other cars.

It is apparent that these rates must be considered as forming one homogenous system. If something is to be taken from it here or added to it there, the symmetry of the whole structure will be destroyed. When the Commission fixed a rate of

27 cents per mile for a 60-foot railway post office car, it did not, and probably could not, with any degree of certainty say how much of that 27 cents was pay for initial and terminal service, how much for carrying a ton of mail matter, how much for carrying the postal employees, how much for cleaning, lighting and heating the car, and how much for carrying tables and racks. To be sure, it is probably possible to estimate with a fair degree of accuracy the number of feet in a car which, on the average, is devoted to distribution, but when the attempt is made to apportion the rate per car upon that same basis it is by no means sure that the result will be a fair and reasonable one.

In discussing the subject of the proper basis of payment, the Commission points out (56 I. C. C. 65) that the largest quantity of mail is transported in full storage cars, and that the average load in such cars is about $6\frac{1}{2}$ tons, while a steel storage car weighs 50 tons; that the average load in the railway post-office cars is about $2\frac{1}{2}$ tons and the weight of the car about 60 tons, and if the railroad is required to haul 50 tons of car weight in hauling $6\frac{1}{2}$ tons of mail, and 60 tons of car weight in hauling $2\frac{1}{2}$ tons of mail, the chief source of expense is in transportation of the car. Without attempting to follow the exhaustive examination of the Commission into all these elements, it is sufficient to say that the result reached was not intended to be a rate for one particular car at any particular time, upon

any particular railroad, or in any particular train over any particular distance, much less for any one foot of space in such a car. It was to be universal in its application, and its fairness and reasonableness follows upon its universal application. If the weight basis had been adopted, the result in the case of any one car might have been quite different. If the space basis had been adopted in part and the weight basis in part, the space rate would, of course, have been quite different. A combination of all factors, reduced to a space basis, and universally applied, makes the rate just.

Plaintiff alleges in its petition (R. 9 and 10) that it takes three full 60-foot railway post-office cars to transport the same volume of mail that is transported in one ordinary baggage car wherein carloads of mail are carried without distribution. The rates established by the Commission gives the company 27 cents a mile for each 60-foot railway post-office car, and 28 cents a mile for a 60-foot storage car. Under the rates established, taking into account the land-grant deduction, the plaintiff would receive 64.8 cents a mile for hauling three railway post-office cars, and 67.2 cents a mile for hauling three 60-foot storage cars. The average load of the three storage cars would be about $19\frac{1}{2}$ tons, while the average load of the three post-office cars would be about $7\frac{1}{2}$ tons. If the plaintiff had been allowed more for hauling the post-office cars, with their comparatively light load, it is by no means certain that

the Commission would have allowed them so much for hauling the storage cars. If the Commission had, as suggested by the railroads, adopted a weight basis for transportation and a space basis for distribution, or if in any way they had separated distribution from transportation, it is by no means certain that the space rate in any particular type of car would have been the same as it is now. As the ruling of the Commission now stands, it is plain that it is impossible to determine what portion of the basic rates can be set apart for initial and terminal facilities, or for distribution, or for transportation, or for the other facilities furnished in the car. To attempt to do so is to destroy the symmetry of the whole structure, which the Commission so carefully and laboriously erected.

For the Court of Claims, therefore, to award a judgment in accordance with the petition would be to nullify and set aside the order of the Commerce Commission. The rates established by the Commission were regarded by it as fair and reasonable upon the basis which they employed. We can not say, nor can any one say, that any one rate would be fair and reasonable except in connection with the other rates. The Commission's rates are by statute to continue in force until changed by the Commission after due notice and hearing, and the statute says of the order establishing rates that during the continuance of the order "the Postmaster General shall pay the carrier from the ap-

propriation herein made such rate or compensation." (39 Stat. 430, appendix p. 47.)

Neither the Court of Claims nor any other court has any right to direct payment at any other rate than that fixed by the Commerce Commission, as long as its order stands, and if the Court of Claims had attempted to comply with the prayer of the petition it would have been nothing more or less than to order a payment in violation of the statute. This the Court of Claims very properly held it could not do. Section 145 of the Judicial Code gives that court no such authority. It is not a claim founded upon an act of Congress, but in direct violation thereof. It is not founded upon the regulations of any executive department, or upon any contract express or implied. Claiming that its action is based upon a law of Congress, the plaintiff asks to be paid a sum additional to what the Act allows. As the Court of Claims says (R. 22), the claim can not be under the statute and against it at the same time. Neither is there any contract, express or implied, to pay anything except the rates established by the Commission pursuant to the statute, nor is the claim based upon the Fifth Amendment. *Klebe v. The United States*, 263 U. S. 188, 189, 192; *United States v. North American Company*, 253 U. S. 330, 335. The statute itself gives any carrier at any time after the lapse of six months, the right to apply to the Commission for a reexamination, and the Urgent Deficiencies Appropriation Act of October 22, 1913, c. 22, 38 Stat. 208, 219, 220, provides

for review of final orders of the Interstate Commerce Commission.

As the Court of Claims says (R. 21):

The Commission determined the compensation allowable for certain types of cars for "each mile of service," and the statute provides that the land-grant road shall receive 80 per cent of this compensation which the ascertained rate produces for each mile of service. The plaintiff has been paid accordingly. The ascertainment of the compensatory rate to the method to be adopted are confided to the Commission and not to the Court of Claims.

And further (R. 22):

The Commission has not ascertained the values of the space or fixed compensation in the way suggested. They fixed compensation for the car, and all its space. The act authorizes the Postmaster General to prescribe the kind of car and authorizes the Commission to fix compensation on the space method. On the other hand, the court is not authorized to prescribe the method or fix compensation, and it can not assume that because the Commission fixed a rate per mile for the entire car, it fixed, or intended to fix, a separate basis of compensation for each of the different spaces used in it. As already said, distribution of the mails can not be entirely separated from their transportation. The plaintiff has been paid for the service rendered in accordance with the rates and compensation fixed by the Com-

mission, and, so far as appears, received the payments as they accrued without protest or objection.

II

THE FURNISHING OF FACILITIES IN THE SO-CALLED RAILWAY POST OFFICE CARS IS INCLUDED IN THE TRANSPORTATION FOR WHICH CONGRESS HAS POWER TO FIX THE PAY UNDER THE LAND GRANT ACTS

The history of the railway mail service affords no basis for the claim that either Congress or the Post Office Department has ever recognized any distinction in principle between transporting the mails and distributing them in transit, but, on the contrary, both have treated the service as a unit with one exception presently to be noticed. (See *History of Railway Mail Service*, transmitted to the Senate on January 21, 1885, by the Postmaster General pursuant to Resolution of the Senate of January 19, 1885, and printed at the Government Printing Office, 1885.)

The first regular railway post office car seems to have been introduced into the postal service in 1862 on the Hannibal & St. Joseph Railroad between Quincy, Illinois, and St. Joseph, Missouri, for the purpose of distributing the California Overland mail, thereby avoiding the delay at St. Joseph and the missing of the regular connection with the stages departing from St. Joseph to the West. (*History of the Railway Mail Service*, p. 81.) Since that time the railroads have furnished cars

of this class under the direction of the Post Office Department. Long before that, however, the distribution of mail matter in transit was carried on by government employees known as "route agents," certainly as far back as 1843. The duties of these route agents, is set forth in the Postal Laws and Regulations of 1843, c. 37, Sec. 243, which states that their business is "to assort the mails for the several post offices, being entrusted with the key to the iron lock for that purpose." In the Regulations of 1852, c. 33, Sec. 201, it is directed that "It is the duty of route agents * * * 2d, To assort the mails for the several offices * * *." The same instruction is carried in the Regulations of 1857, c. 15, Sec. 184. The Postmaster General, in his annual report for 1853, reported compensation paid for route agents in the sum of \$165,224.55.

That the transportation of the mails has always included such distribution of the mails en route on trains as the Postmaster General might arrange for, is further conclusively shown by an examination of his Annual Reports, where mention is made from time to time of the employment of mail agents on railway trains making distribution of the mails. In his Report for 1853, page 5, he comments on the insufficiency of the mail cars and the want of proper accommodations by reason of which mail agents were unable properly to discharge their duties, then becoming more important owing to the increase in

the way distributions. He reports that to remedy this evil he had prepared a model of a mail car which he had transmitted to the different railroad companies and that in those cases where the contracts gave him power to build a mail car, when the one furnished was unsuited to the purpose, he had ordered it done and charged the cost to the company.

In his Report for 1854 he comments again upon the necessity for accommodations in cars for distribution purposes, and refers to cars 25 feet in length, 15 feet of which was used for mail room "and 10 for a post office," and further states that such accommodations are required both for the security of the mails, and to enable the route agents properly to discharge their duties.

In the Annual Reports for 1855, page 6; 1857, pages 15, 16 and 17; 1858, pages 3 and 4; 1859, page 17; and 1860, page 2, further reference is made specifically to the work of the route agents and the cost of such service.

It was in 1862 that a definite move was made to specialize the distribution of mails en route on trains on a larger scale by the use in a greater degree of full cars, fitted up and furnished for railway mail or distribution purposes. *History Railway Mail Service*, pp. 81 *et seq.* This was in no sense a change in the system that had been in a lesser degree in effect during the preceding years. With this enlargement, this full-car service began

to be known as a traveling post office, but it was still a part of the transportation service without any distinction being made whatever as to the amount or character of pay given the railroads for the service as a whole.

Beginning with the Report for the fiscal year of 1867, the Postmaster General set forth in a table "size, etc., of mail car or apartment," in connection with each route, the full or complete car used for distribution purposes, or railway post office, designated as "R. P. O." Apartments for the distribution of mails are indicated by lesser lengths in the car where fixtures and furniture are furnished. The symbols for this equipment are indicated in the tables. Where mails were merely carried in the baggage car, such fact is also indicated. (See table "E" of the Report for 1867.) It will be noted from this that distribution space in varying lengths running from a minor part of a car to the full car was a condition prevailing throughout the service. No special rate was allowed for this facility, the rate per mile per annum being fixed under the Act of March 3, 1845, c. 44, 5 Stat. 732, 738, for the transportation of the mails, including all car facilities.

See also table "E" of the Reports of the Postmaster General for 1868 to 1872, inclusive. The reports for subsequent years show like data.

Prior to 1872 the railroads received no pay for furnishing railway post office cars except upon the straight basis of transportation. By the Act of

June 8, 1872, c. 335, Sec. 265, 17 Stat. 283, 316, it was provided that the Postmaster General might allow additional pay to any railroad with which he contracted for carrying the mail, which furnished "railway post office cars for the transportation of the mail," such additional compensation beyond that allowed by law as he might think fit, not exceeding, however, 50 per centum of the lawful rates.

By the Act of March 3, 1873, c. 231, 17 Stat. 556, 558, Congress provided for a general readjustment of rates based upon an actual weighing of the mails carried, and repealed the provision of the Act of June 8, 1872, for paying of additional compensation for railway post office cars. The authorized rates were to be paid upon condition—

* * * That the mails shall be conveyed with due frequency and speed; that sufficient and suitable room, fixtures and furniture, in a car or apartment properly lighted and warmed, shall be provided for route-agents to accompany and distribute the mails;

And it was also provided "that additional pay may be allowed for every line comprising a daily trip each way of railway post office cars" at rates varying from \$25 per mile per annum for 40-foot cars to \$50 per annum for cars over 55 feet in length. No additional pay, however, was allowed for such cars under 40 feet in length. That provision, in substance, was carried into Section 4004 of the Revised Statutes. The facilities referred

to in that Act were the same as those which have grown up in the development of the service, and which are now recognized as a part of transportation. The rates fixed by the statute applied to all roads.

It was not until 1876 that Congress, by the Act of July 12, 1876, c. 179, Sec. 13, 19 Stat. 78, 82, exercised its power to fix the price for the transportation of the mails by land-aided railroads. It provided:

Railroad companies whose railroad was constructed in whole or in part by land grant made by Congress * * * shall receive only 80 per centum of the compensation authorized by this act.

This Act directed the Postmaster General to reduce by 10 per cent the compensation of railroads for transporting the mails from the rates fixed, on the basis of weight, by the Act of March 3, 1873, but contained no provision relating to the pay authorized by the Act of 1873 for full railway post office cars upon a mileage basis. The Post Office Department, in administering it, applied its terms to the pay for everything carried upon a weight basis, including the furnishing of facilities for handling and distributing mails in apartment railway post office cars, and excluding only the specific additional pay provided by the Act of 1873. The additional pay provided by that Act was only for lines of full railway post office cars 40 feet or more in length, making a daily trip each

way. The annual reports of the Postmaster General show such a construction. In no instance has it been applied to cars of less than 40 feet in length or to apartment cars, although the same distribution was carried on in each.

Historically, therefore, there is no room for doubt that the furnishing of railway Post Office facilities in such cars has always been considered an essential part of "transportation." From the very beginning it has been recognized that Congress has had full authority thereover, and this power has not been impaired by any such distinction as appellant now draws between the transportation of the mails and the furnishing of distribution facilities in Post Office cars. Therefore, the term "transportation of the mails" includes not only the furnishing of distribution facilities in connection therewith, but all other incidental services appertaining to and essential for the efficient transportation of the mails.

As pointed out by the Interstate Commerce Commission (56 I. C. C. 77), while the distribution of the mails is being carried on in Post Office apartment cars the same mail is being hauled in the racks and partitions therein provided. The very nature of this particular service is so closely connected or related to the transportation of the mails under this system, which has been in use for many years, that it can not be considered as being separate and distinct in the manner for which appellant contends.

All that has been said herein with regard to the extent of the control that may be exercised by Congress with regard to the transportation of the mails applies with equal force to the terms of the land-grant reservations upon the question of remuneration for such services. What constitutes transportation of the mails in the one case applies with equal force in determining the meaning of the same term in the other. The legislative authority is co-extensive in each case.

There is no justification for a narrower view, and never has a narrower view been applied to land-grant railroads. It is true that the Act of 1873 authorized additional pay for all railroads furnishing daily trips each way of railway post office cars 40 feet or more in length, at a flat rate per car per mile per annum, at a time when other service was paid for upon a weight basis. Obviously it was fair so to do, for the weight carried in such cars is out of all proportion to the space occupied in comparison with storage cars, but when the whole service is adjusted upon a space basis that discrepancy disappears. It is also true that the Act of 1876, reducing the pay of all railroads for mail transported upon a *weight* basis, and making a 20 per cent deduction for land-grant roads, was not interpreted as making the land-grant rate applicable to 40-foot post office cars for which a special rate had been authorized by the Act of 1873. That, however, can not be construed as recognition of the principle for

which the plaintiff contends, or as a recognition by Congress or the Department, of a lack of power in Congress over the whole subject, for the land-grant deduction was still applicable, and was applied, to the other service similar in character. That Congress did not exercise its power in respect to land-grant railroads until 1876, did not deprive it of its power to do so, nor does the fact that it did not then exercise the power completely, constitute a waiver of any portion of that power. The power existed at all times to be exercised when, if, and as Congress should determine.

The Act of 1916 took the service as it was, merely changing the basis of pay from a system measured by weight, frequency and speed, to a system measured by space. Weight was wholly abandoned and space adopted in its stead. This necessitated a re-description of the service stated under the four divisions already noted. The services were the same stated in different terms, and all constitute "transportation of the mails." With this change additional pay for a special type of car disappeared.

The land-grant acts are not to be construed so narrowly as to render their operation impracticable. As the Court of Claims says (R. 20) :

When they declare that the mails shall be transported under the direction of the Post Office Department we think they imply more than the mere placing of the mails in bulk in a car to be carried between given termini. The bulk changes by additions to it and sub-

tractions from it. The making of these additions and subtractions as the different stations are reached involves space additional to that occupied by the bulk itself. What is to be transmitted is not mere weight bulk or freight but the "mails" and the act must be construed to give effect to its purpose.

The words in the Act that the mails shall be transported "under the direction of the Post Office Department" must be given effect. Mails were to be transported in such manner and according to such methods as the Department, acting according to law, should direct, and the right was reserved by Congress to fix the pay for transportation thus determined and directed. The power reserved by Congress to fix the price was the power to fix the price for transporting them according to the manner and system directed by the Department under the law. It may be that the railroads, when they accepted the land grants, did not foresee the development of the postal service. It may also be that Congress did not foresee the development of the railroad system. To say that the right of Congress to fix the pay must be limited to the methods employed 75 years ago, is as illogical as it would be to say that it could be exerted only over the primitive single-track, sand-ballasted road, equipped with wooden cars, hauled by wood-burning engines, which then was regarded as the ultimate and crowning triumph of man's effort to annihilate distance by speed.

III

NO CAUSE OF ACTION BASED UPON FAILURE TO RECEIVE
JUST COMPENSATION IS SET FORTH IN THE PETITION

Just compensation for the services performed by a common carrier is a fair and reasonable rate. The plaintiff concedes that the only service for which it is entitled to be paid at fair and reasonable rates is that which remains after strict "transportation" has been eliminated, for, as to the latter, the plaintiff is entitled to receive only what Congress chooses to give. When Congress made the grants of land it reserved a substantial right, the right to limit payment for transportation of the mails to such amount as it deemed proper, computed upon any basis it deemed appropriate. Using 20 per cent. of the basic rate paid other railroads for the entire service as a means of measuring the extent to which it would exercise that right, has not deprived the plaintiff of those portions of the basic rate for distribution which it seeks to recover.

Assuming *arguendo*, (1) that Congress can fix the price only for mere "transportation of the mails," giving to that term the narrow construction to which appellant contends; (2) that the Interstate Commerce Commission in fixing the rates has actually divided these cars upon a space basis according to the facilities of fixtures furnished therein; (3) that it is possible to divide the

basic rates according to such space allotment, and (4) that all the miscellaneous services which are included in the flat rates can be separated therefrom without fixing new rates, let us examine the situation mathematically.

Conceding that the basic rates are fair and reasonable; that is, compensatory, the claim of the plaintiff is that 60 per cent of the space furnished in a full 60-foot railway post-office car, 56⅔ per cent of the space furnished in a 30-foot apartment car, and 46⅔ per cent of the space furnished in a 15-foot railway apartment car, consisted of distributing space for which it is entitled to receive the basic rate without land-grant deduction. The basic rate for a 60-foot car is 27 cents per mile, and the land-grant rate, 80 per cent thereof, is 21.6 cents. Sixty per cent of the space is distribution space for which it is entitled to the full rate; that is, 16.2 cents. If the entire land-grant deduction is taken from the basic rate for the balance of the car, it leaves 5.4 cents as the amount received by it for the rest of the service. The result is that the plaintiff receives the full compensatory rate for the service for which it claims it is entitled to that rate, and 5.4 cents as pay for the service for which Congress admittedly may pay what it chooses. Similar calculations, differing only in amounts, show similar results with respect to the 30-foot and 15-foot cars. Applying the unit, therefore, fixed by Congress as the factor for measuring the applica-

tion of its power over land-grant railroad rates, it leaves the plaintiff with the full compensatory rate for that portion of the service over which it has claimed Congress is without power. When a common carrier claims that a certain rate deprives it of its property without due process of law, it must show as a fact that the rate complained of is not compensatory. If Congress had fixed a flat rate for land-grant railroads for strict transportation at 5.4 cents per mile in full 60-foot cars, and the Interstate Commerce Commission had fixed 16.2 per mile for the rest of the car, the result to the company would have been the same. Of course we do not claim that the Commerce Commission actually figured the rates in this way, but we have just as much right to figure them this way in order to sustain the Commission's action, as the plaintiff has to figure them in some other way in order to defeat it.

Congress is not required to pay 80 per cent of the fair rate for transportation over land-grant roads. It could have fixed a price much lower, and we submit that when it fixes 80 per cent as a basis of measurement and the result leaves the railway in receipt of the full compensatory rate for such portion of the service as it is without power to fix, with a wide margin of pay remaining, it can not be said that the net result is noncompensatory.

CONCLUSION

THE JUDGMENT OF THE COURT OF CLAIMS SHOULD
BE AFFIRMED.

WILLIAM D. MITCHELL,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

RANDOLPH S. COLLINS,
Attorney.

APRIL, 1926.

APPENDIX

Section 5, Act of July 28, 1916 (c. 261, 39 Stat. 412, 425-431):

SEC. 5. That the Postmaster General is authorized and directed to readjust the compensation to be paid to railroad companies from and after the thirtieth day of June, nineteen hundred and sixteen, or as soon thereafter as may be practicable, for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and at the rates hereinafter provided.

The Postmaster General may state railroad mail routes and authorize mail service thereon of the following four classes, namely: Full railway post-office car service, apartment railway post-office car service, storage-car service, and closed-pouch service.

Full railway post-office car mail service shall be service by cars forty feet or more in length, constructed, fitted up, and maintained for the distribution of mails on trains. The authorizations of full railway post-office cars shall be for standard-sized cars sixty feet in length, inside measurement, except as hereinafter provided [p. 425].

Apartment railway post-office car mail service shall be service by apartments less than forty feet in length in cars constructed, fitted up, and maintained for the distribution of mails on trains. Two standard sizes of apartment railway post-office

cars may be authorized and paid for, namely, apartments fifteen feet and thirty feet in length, inside measurement, except as hereinafter provided.

Storage-car mail service shall be service by cars used for the storage and carriage of mails in transit other than by full and apartment railway post-office cars. The authorizations for storage cars shall be for cars sixty feet in length, inside measurement, except as hereinafter provided: *Provided*, That storage space in units of three feet, seven feet, fifteen feet, and thirty feet, both sides of car, may be authorized in baggage cars at not exceeding pro rata of the rates hereinafter named for sixty-foot storage cars.

Service by full and apartment railway post-office cars and storage cars shall include the carriage therein of all mail matter, equipment, and supplies for the mail service and the employees of the Postal Service or Post Office Department, as shall be directed by the Postmaster General to be so carried.

Closed-pouch mail service shall be the transportation and handling by railroad employees of mails on trains on which full or apartment railway post-office cars are not authorized, except as hereinbefore provided. The authorizations for closed-pouch service shall be for units of seven feet and three feet in length, both sides of car.

The rates of payment for the services authorized in accordance with this section shall be as follows, namely:

For full railway post-office car mail service at not exceeding 21 cents for each mile of service by a sixty-foot car.

In addition thereto he may allow not exceeding \$4.25 as a combined initial and terminal rate for each one-way trip of a sixty-foot car.

For apartment railway post-office car mail service at not exceeding 11 cents for each mile of service by a thirty-foot apartment car and 6 cents for each mile of service by a fifteen-foot apartment car.

In addition thereto he may allow not exceeding \$2.75 as a combined initial and terminal rate for each one-way trip of a thirty-foot apartment car and \$2 as a combined initial and terminal rate for each one-way trip of a fifteen-foot apartment car.

For storage-car mail service at not exceeding 21 cents for each mile of service by a sixty-foot car.

In addition thereto he may allow not exceeding \$4.25 as a combined initial and terminal rate for each one-way trip of a sixty-foot car.

Where authorizations are made for cars of the standard lengths of sixty, thirty, and fifteen feet, as provided by this section, and the railroad company is unable to furnish such cars of the length authorized, but furnishes cars of lesser length than those authorized, but which are determined by the department to be sufficient for the service, the Postmaster General may accept the same and pay only for the actual space furnished and used, the compensation to be not exceeding pro rata of that provided by this section for the standard length so authorized: *Provided*, That the Postmaster General may accept cars and apartments of greater length than those of the standard requested, but no compensation shall be allowed for such excess lengths.

For closed-pouch service, at not exceeding 1½ cents for each mile of service when a three-foot unit

is authorized, and 3 cents for each mile of service when a seven-foot unit is authorized.

In addition thereto he may allow not exceeding 25 cents as the combined initial and terminal rate for each one-way trip of a three-foot unit of service and 50 cents as a combined initial and terminal rate for each one-way trip of a seven-foot unit of service.

Railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress, on the condition that the mails should be transported over their roads at such price as Congress should by law direct, shall receive only eighty per centum of the compensation otherwise authorized by this section.

The initial and terminal rates provided for herein shall cover expenses of loading and unloading mails, switching, lighting, heating, cleaning mail cars, and all other expenses incidental to station service and required by the Postmaster General in connection with the mails that are not included in the car-mile rate. The allowance for full railway post-office cars, apartment railway post-office cars, and storage cars may be varied in accordance with the approximate difference in their respective cost of construction and maintenance [p. 426].

In computing the car miles of the full railway post-office cars and apartment railway post-office cars, the maximum space authorized in either direction of a round-trip car run shall be regarded as the space to be computed in both directions, unless otherwise mutually agreed upon.

In computing the car miles of storage cars, the maximum space authorized in either direction of a round-trip car run shall be regarded as the space

to be computed in both directions, unless the car be used by the company in the return movement, or otherwise mutually agreed upon.

New service and additional service may be authorized at not exceeding the rates herein provided, and service may be reduced or discontinued with pro rata reductions in pay, as the needs of the Postal Service may require: *Provided*, That no additional pay shall be allowed for additional service unless specifically authorized by the Postmaster General.

The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates than those herein specified, and make report to Congress of all cases where such special contracts are made and the terms and reasons therefor.

All cars or parts of cars used for the Railway Mail Service shall be of such construction, style, length, and character, and furnished in such manner as shall be required by the Postmaster General, and shall be constructed, fitted up, maintained, heated, lighted, and cleaned by and at the expense of the railroad companies. No pay shall be allowed for service by any railway post-office car which is not sound in material and construction and which is not equipped with sanitary drinking-water containers and toilet facilities, nor unless such car is regularly and thoroughly cleaned. No pay shall be allowed for service by any wooden full railway post-office car unless constructed substantially in accordance with the most approved plans and speci-

fications of the Post Office Department for such type of cars, nor for service by any wooden full railway post-office car run in any train between adjoining steel cars, or between the engine and a steel car adjoining. After the first of July, nineteen hundred and seventeen, the Postmaster General shall not approve or allow to be used, or pay for service by, any full railway postoffice car not constructed of steel or steel underframe or equally indestructible material; and all full railway post-office cars accepted for this service and contracted for by the railroad companies hereafter shall be constructed of steel. Until July first, nineteen hundred and seventeen, in cases of emergency and in cases where the necessities of the service require it, the Postmaster General may provide for service by full railway post-office cars of other than steel or steel underframe construction, and fix therefor such rate of compensation within the maximum herein provided as shall give consideration to the inferior character of construction, and the railroad companies shall furnish service by such cars at such rates so fixed.

Service over property owned or controlled by another company or a terminal company shall be considered service of the railroad company using such property and not that of the other or terminal company: *Provided*, That service over land-grant road shall be paid for as herein provided [p. 427].

Railroad companies carrying the mails shall furnish all necessary facilities for caring for and handling them while in their custody. They shall furnish all cars or parts of cars used in the transportation and distribution of the mails, except as

herein otherwise provided, and place them in stations before the departure of trains at such times and when required to do so. They shall provide station space and rooms for handling, storing, and transfer of mails in transit, including the separation thereof, by packages for connecting lines, and such distribution of registered mail in transit as may be necessary, and for offices for the employees of the Railway Mail Service engaged in such station work when required by the Postmaster General, in which mail from station boxes may be distributed if it does not require additional space.

If any railroad company carrying the mails shall fail or refuse to provide cars or apartments in cars for distribution purposes when required by the Postmaster General, or shall fail or refuse to construct, fit up, maintain, heat, light, and clean such cars and provide such appliances for use in case of accident as may be required by the Postmaster General, it shall be fined such reasonable sum as may, in the discretion of the Postmaster General, be deemed proper.

The Postmaster General shall in all cases decide upon what trains and in what manner the mails shall be conveyed. Every railroad company carrying the mails shall carry on any train it operates, and with due speed, all mailable matter, equipment, and supplies directed to be carried thereon. If any such railroad company shall fail or refuse to transport the mails, equipment, and supplies when required by the Postmaster General on any train or trains it operates, such company shall be fined such reasonable amount as may, in the discretion of the Postmaster General, be deemed proper.

The Postmaster General may make deductions from the pay of railroad companies carrying the mails under the provisions of this section for reduction in service or infrequency of service where, in his judgment, the importance of the facilities withdrawn or reduced requires it, and impose fines upon them for delinquencies. He may deduct the price of the value of the service in cases where it is not performed, and not exceeding three times its value if the failure be occasioned by the fault of the railroad company.

The provisions of this section shall apply to service operated by railroad companies partly by railroad and partly by steamboats.

The provisions of this section respecting the rates of compensation shall not apply to mails conveyed under special arrangement in freight trains, for which rates not exceeding the usual and just freight rates may be paid, in accordance with the classifications and tariffs approved by the Interstate Commerce Commission.

Railroad companies carrying the mails shall submit, under oath, when and in such form as may be required by the Postmaster General, evidence as to the performance of service.

The Postmaster General shall, from time to time, request information from the Interstate Commerce Commission as to the revenue received by railroad companies from express companies for services rendered in the transportation of express matter, and may, in his discretion, arrange for the transportation of mail matter other than of the first class at rates not exceeding those so ascertained and reported to him, and it shall be the duty of the rail-

road companies to carry such mail matter at such rates fixed by the Postmaster General.

The Postmaster General is authorized, in his discretion, to petition the Interstate Commerce Commission for the determination of a postal carload or less-than-carload rate for transportation of mail matter of the fourth class and periodicals, and may provide for and authorize such transportation, when practicable, at such rates, and it shall be the duty of the railroad companies to provide and perform such service at such rates and on the conditions prescribed by the Postmaster General [p. 428].

The Postmaster General may, in his discretion, distinguish between the several classes of mail matter and provide for less frequent dispatches of mail matter of the third and fourth classes and periodicals when lower rates for transportation or other economies may be secured thereby without material detriment to the service.

The Postmaster General is authorized to return to the mails, when practicable for the utilization of car space paid for and not needed for the mails, postal cards, stamped envelopes, newspaper wrappers, empty mail bags, furniture, equipment, and other supplies for the Postal Service.

The Postmaster General, in cases of emergency between October first and April first of any year, may hereafter return to the mails empty mail bags and other equipment theretofore withdrawn therefrom as required by law, and, where such return requires additional authorization of car space under the provisions of this section, to pay for the transportation thereof as provided for herein out

of the appropriation for inland transportation by railroad routes.

The Postmaster General may have the weights of mail taken on railroad mail routes, and computations of the average loads of the several classes of cars and other computations for statistical and administrative purposes made at such times as he may elect, and pay the expense thereof out of the appropriation for inland transportation by railroad routes.

Pending the decision of the Interstate Commerce Commission, as hereinafter provided for, the existing method and rates of railway mail pay shall remain in effect, except on such routes or systems as the Postmaster General shall select, and to the extent he may find it practicable and necessary to place upon the space system of pay in the manner and at the rates provided in this section, with the consent and approval of the Interstate Commerce Commission, in order to properly present to the Interstate Commerce Commission the matters hereinafter referred thereto: *Provided*, That if the final decision of the Interstate Commerce Commission shall be adverse to the space system, and if the rates established by it under whatever method or system is adopted shall be greater or less than the rates under this section, the Postmaster General shall readjust the compensation of the carriers on such selected routes and systems in accordance therewith, from the dates on which the rates named in this section became effective.

All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service pre-

scribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.

The Interstate Commerce Commission is hereby empowered and directed as soon as practicable to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until changed by the commission after due notice and hearing.

In fixing and determining the fair and reasonable rates for such service the commission shall consider the relation existing between the railroads as public service corporations and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroads [p. 429].

The procedure for the ascertainment of said rates and compensation shall be as follows:

Within three months from and after the approval of this Act, or as soon thereafter as may be practicable, the Postmaster General shall file with the commission a statement showing the transportation required of all railway common carriers, including the number, equipment, size, and construction of the cars necessary for the transaction of the business; the character and speed of the trains which are to carry the various kinds of mail; the service, both terminal and en route, which the carriers are

to render; and all other information which may be material to the inquiry, but such other information may be filed at any time in the discretion of the commission.

The Postmaster General is authorized to employ such clerical and other assistance as shall be necessary to carry out the provisions of this section, and to rent quarters in Washington, District of Columbia, if necessary, for the clerical force engaged thereon, and to pay for the same out of the appropriation for inland transportation by railroad routes. The Postmaster General shall file with the commission a comprehensive plan for the transportation of the mails on said railways and shall embody therein what he believes to be the reasonable rate or compensation the said railway carriers should receive.

Thereupon the commission shall give notice of not less than thirty days to each carrier so required to transport mail and render service, and upon a day to be fixed by the commission, not later than thirty days after the expiration of the notice herein required, each of said carriers shall make answer and the commission shall proceed with the hearing as now provided by law for other hearings between carriers and shippers or associations.

All the provisions of the law for taking testimony, securing evidence, penalties, and procedure are hereby made applicable.

For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification.

Pending such hearings, and the final determination of the question, if the Interstate Commerce Commission shall determine that it is necessary or advisable, in order to carry out the provisions of this section, to have additional and more frequent weighing of the mails for statistical purposes, the Postmaster General, upon request of the commission, shall provide therefor in the manner now prescribed by law, but such weighing need not be for more than thirty days.

At the conclusion of the hearing the commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the service connected therewith, and during the continuance of the order the Postmaster General shall pay the carrier from the appropriation herein made such rate or compensation.

Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination, and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein.

For the purposes of this section the Interstate Commerce Commission is hereby vested with all the powers which it is now authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers [p. 430].

The Interstate Commerce Commission shall allow to railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress on condition that the mails should be transported over their roads at such price as Congress should by law direct only eighty per centum of the compensation paid other railroads for transporting the mails and all service by the railroads in connection therewith.

The existing law for the determination of mail pay, except as herein modified, shall continue in effect until the Interstate Commerce Commission under the provisions hereof fixes the fair, reasonable rate or compensation for such transportation and service.

That the appropriations for inland transportation by railroad routes and for railway post-office car service for the fiscal year ending June thirtieth, nineteen hundred and seventeen, are hereby made available for the purposes of this section.

That it shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General so to do, and for such offense shall be fined \$1,000. Each day of refusal shall constitute a separate offense [p. 431].

SUPREME COURT OF THE UNITED STATES.

No. 280.—OCTOBER TERM, 1925.

Missouri Pacific Railroad Company,	}	Appeal from the Court of Claims.
Appellant,		
vs.		
The United States.		

[June 7, 1926.]

Mr. Justice SUTHERLAND delivered the opinion of the Court.

Appellant operates and since June, 1917, has operated a system of railroads which includes a number of land-grant lines in Missouri and other states. These lines received land grants in aid of their construction and are bound to carry the United States mails, under the provisions of land-grant acts, passed in 1852 and 1853, § 6, c. 45, 10 Stat. 8, 10; § 6, c. 59, 10 Stat. 155, 156, both of which provide that the United States mails shall be transported on the railroads receiving the grants at all times "under the direction of the Post-Office Department, at such price as Congress may by law direct."

By the Act of July 28, 1916, § 5, c. 261, 39 Stat. 412, 425-431, the Interstate Commerce Commission was directed "to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of . . . mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, . . ." In respect of land-grant lines, the act provides:

"The Interstate Commerce Commission shall allow to railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress on condition that the mails should be transported over their roads at such price as Congress should by law direct only eighty per centum of the compensation paid other railroads for transporting the mails and all service by the railroads in connection therewith."

The act confers upon the Postmaster General the power to state railroad mail routes and authorizes mail service thereon of four

classes, the first two of which are: (1) full railway post-office car service, (2) apartment railway post-office car service. For the first class, service is to be "by cars forty feet or more in length, constructed, fitted up, and maintained for the distribution of mails on trains." For the second class, the service is the same "by apartments less than forty feet in length," etc. The service is to include the carriage of mail matter, equipment, and supplies for the mail service and the employees of the Postal Service or Post Office Department, as the Postmaster General shall direct to be carried. All cars and parts of cars used for the service are to be of such construction, style, length, and character, and furnished in such manner as the Postmaster General shall require, and are to be constructed, fitted up, maintained, heated, lighted, and cleaned by and at the expense of the railroad companies. The railroad companies are required to furnish all necessary facilities for caring for and handling the mails while in their custody. The act further provides that all railway common carriers are required to transport such mail matter as may be offered for transportation, etc., and shall be entitled to receive fair and reasonable compensation "for such transportation and for the service connected therewith."

The Interstate Commerce Commission, after a hearing, made an exhaustive report and determined that mail should be carried upon the basis of space, instead of weight. Upon that basis, the Commission fixed rates for all services required to be performed by the act and declared that the land-grant railroads were entitled to eighty per cent. thereof under the law. It was urged before the Commission on behalf of these railroads that this provision of the law "should not apply to the distributing space in R. P. O. and apartment cars, because the service of carrying distributing facilities cannot properly be construed as transportation of the mails as defined in the law." But the Commission held otherwise. *Railway-Mail Pay*, 56 I. C. C. 1, 77. Thereupon, appellant filed its petition in the court below alleging the facts and praying judgment against the United States for \$189,880.54 as compensation for the use of the distributing space upon the same ground as that urged before the Commission. The amount of the demand was arrived at by separating the car space said to be used for mail distributing purposes from the space devoted to storage purposes,

and adding twenty per cent. to that portion of the eighty per cent. allowance which was claimed to be assignable to the distributing space. The Court of Claims sustained a demurrer to the petition and entered judgment of dismissal. 59 C. Cls. 524; 60 C. Cls. 183.

That the Commission is authorized by the act of 1916 to fix rates for the transportation of the mails, that the rates fixed by the Commission are reasonable, and that Congress has plenary power to determine the price at which the land-grant roads shall transport the mail, are propositions which are not here in dispute. The contention is that this power does not enable Congress to fix the pay of the land-grant roads for furnishing distributing space and facilities; but that these items under the requirement of the land-grant acts are separable from and in addition to transportation, and should be paid for at the same rates accorded other railroads.

Unmistakably, the act of 1916 authorized the Commission to do precisely what it did, namely, to determine the fair and reasonable rates and compensation to be paid, upon a space-basis, for the transportation of mail matter "and the service connected therewith"; and, thereupon, to allow the land-grant roads eighty per cent. of those rates and compensation for like transportation "and all service . . . in connection therewith." It would do manifest violence to these plain words to say that Congress intended, in the one case, that the Commission should fix the compensation to be paid railroads generally for transportation, including service connected therewith, but did not intend, in the other case, although it used almost the same words, the eighty per cent. of that compensation, and no more, should be allowed the land-grant roads for like transportation and service.

But, it is urged that thus to construe the act of 1916 is to enlarge the authority of Congress under the land-grant acts so as to permit that body to require the land-grant roads, without compensation, to perform service in addition to that embraced within the word "transportation." It is said that railway postal cars originated after the passage of the land-grant acts. But it does not follow that such cars are not fairly within the meaning of those acts as essentially incident to transportation. The provision reaches into the future; and, while its meaning does not change, its application may well embrace new conditions and new instru-

mentalities which come within the scope of the terms employed. This is in accordance with the universal law of language. In a sense, words do not change their meaning; but the application of words grows and expands with the growth and expansion of society. Compare *South Carolina v. United States*, 199 U. S. 437, 448-449.

To transport any article involves, as a necessary incident, furnishing facilities for its transportation; and the character and extent of these facilities will depend upon the nature of the thing transported. Facilities appropriately employed in the transportation of lumber, for example, would be wholly inappropriate in the transportation of live stock. The mail includes a variety of things gathered from and carried to innumerable places. Letters and parcels must be received, more or less piecemeal, and then assorted and put in convenient form for delivery at the places to which they are addressed; and, if the mails are to go forward with dispatch, this involves assortment and preparation for delivery in transit; and this, in turn, necessarily requires that facilities to that end must be provided.

Nor can we ignore the provision of the land-grant acts that the mails are to be transported "under the direction of the Postoffice Department." The authority is a continuing one and not to be limited to such methods of direction as were customary at the dates of the acts. The mail was to be transported "at all times" under this direction. The power of the Postoffice Department to direct the transportation is of the same quality as the power of Congress to fix the price, and includes not only the authority to say when the transportation shall take place and between what points, but to impose such conditions as are necessarily incident to the transportation, having regard to the peculiar nature of the things to be transported. We fully agree with the court below that the land-grant acts are not to be so narrowly construed as to render their operation impracticable. "When they declare that the mails shall be transported under the direction of the Post Office Department we think they imply more than the mere placing of the mails in bulk in a car to be carried between given termini. The bulk changes by additions to it and subtractions from it. The making of these additions and subtractions as the different stations are reached involves space additional to that occupied by the bulk

itself. What is to be transported is not mere weight bulk or freight but the 'mails' and the act must be construed to give effect to its purpose."

We fairly may assume, in the absence of any evidence to the contrary, that, in fixing the allowance to be paid to the land-grant roads at eighty per cent. of the fair and reasonable compensation to be paid railroads generally, Congress has given due weight to all the circumstances—not only to the kind and character of the service, but to the fact that the companies are required to furnish all facilities incidental thereto. In any event, it was for Congress to say what reduction should be made from the amount of full compensation in consideration of the land grants; and its action in that respect is not open to judicial review.

Judgment affirmed.

A true copy.

Test

Clerk, Supreme Court, U. S.